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# REPORTS OF CASES

HEARD AND DETERMINED IN THE

APPELLATE DIVISION

OF THE

# S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

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AUSTIN B. GRIFFIN, REPORTER.

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J. B. LYON COMPANY,  
ALBANY, N. Y.

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OF

THE APPELLATE DIVISION OF THE SUPREME COURT.

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DAVID W. MYERS, Appellant, *v.* HAZEL A. MYERS, an Infant,  
Respondent.

First Department, May 27, 1921.

**Parent and child — adoption — annulment on application of natural parent — allegations that plaintiff was misled in signing consent — facts not shown justifying annulment.**

The annulment of two orders of adoption of the defendant, who is plaintiff's child, was properly denied where it appeared that shortly after the death of the defendant's mother the plaintiff and the defendant and her grandmother personally appeared before the county judge and the plaintiff signed and acknowledged a formal certificate consenting to the adoption of the defendant by her grandmother; and the fact that the plaintiff relied on the advice of an attorney, that it would not be lawful for his mother to take the defendant without the approval of the court, and that he believed that the proceeding would not sever or in any way abrogate his relationship to the child, does not relieve him from his formal appearance and acts in accordance with the statute, in the absence of any proof that he was induced to sign said consent or to refrain from reading it by any misrepresentation of fact made to him.

The original order for the adoption of the defendant by the plaintiff's mother being valid, the plaintiff cannot contend that the subsequent adoption of the defendant by his sister on the consent of his mother, who was then the foster parent of the defendant, was fraudulent and void, where it is not alleged that any fraud or deception was perpetrated on the foster

parent, for any fraud or deception that may have been practiced on the plaintiff subsequent to the first adoption does not in any way affect the validity of the second adoption.

APPEAL by the plaintiff, David W. Myers, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of December, 1920, as resettled by an order entered in said clerk's office on the 30th day of December, 1920, dismissing the complaint on defendant's motion for judgment on the pleadings consisting of the complaint and answer, and also from the judgment dismissing the complaint entered in the office of the clerk of said court on the 30th day of December, 1920.

*Ralph Stout* [*Adolph Ruger*, attorney], for the appellant.

*Frank B. York* [*York & York*, attorneys], for the respondent.

LAUGHLIN, J.:

This is an action brought for the annulment of two orders for the adoption of the defendant, who is plaintiff's child. Defendant was born on the 4th of January, 1905. Her mother died on the 11th of March, 1906, and on the 31st day of that month an order in due form as prescribed by the then existing Domestic Relations Law (Gen. Laws, chap. 48 [Laws of 1896, chap. 272], § 60 *et seq.*, as amd.) was made by Judge ASPINALL, county judge of Kings county, allowing and confirming the adoption of the defendant by the mother of the plaintiff. The order recites that the plaintiff and the defendant and her grandmother personally appeared before the judge and were examined by him, and the petition for adoption and the order show that the plaintiff signed and acknowledged before the county judge on that day a formal certificate consenting to the adoption. The order and plaintiff's consent thereto are not set forth in the complaint; but they are made part of the answer and as will be seen they contain only what the statute required and failure to comply with the statute is not shown by the complaint. The complaint contains allegations tending to show that the plaintiff was misled and deceived by his sister and by an attorney into going before the county judge and executing his consent to the adoption. It contains no allegation with respect to any

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false representation made at the time of the adoption or with respect to the contents of the paper which he executed and which was his consent to the adoption. It is alleged that the plaintiff and his sister were domestic servants in the employ of Dr. Shepard, a physician of prominence and wealth; that plaintiff's sister applied to him for leave to take and bring up the defendant and he declined her request and thereupon his mother offered to take and care for the child and he agreed to place the defendant with his mother until she attained an age when it would be possible for him to care for her, or until a change in his financial circumstances by which he would be better able to give her the care and attention which she required, and that he was then advised by Frank B. York an intimate acquaintance of and the attorney for Dr. Shepard that it would not be lawful for his mother to take the defendant without the approval of the court and that it would be necessary for him to go with his mother and the defendant to court and to have the court approve the arrangement, and that he believed said statements at the time "and relied on them in his subsequent acts," and accordingly on the 31st of March, 1906, went with his mother and the defendant to the County Court in Kings county "and appeared before some person unknown" to him and "then and there signed some papers, the purport of which was not explained to him, but which he has just been informed and believes was a consent on his part to the legal adoption" of the defendant by his mother; and he was not at any time informed by his mother or by York or by any other person "that by signing of the adoption papers above referred to, he would sever or in any way abrogate his relationship, either legal or otherwise, to the said child, but he was at all times told and led to believe by them that the said child would be restored to him at any time he desired." Plaintiff does not state whether or not he read the paper which he signed, which was the consent for the adoption of the defendant, or that he was induced to refrain from reading it by any misrepresentation of fact or that any misrepresentation of fact with respect to the contents of the paper was made to him. On no theory was he justified in relying blindly on the statement made by York that it would not be lawful for his mother to take the custody of the child temporarily, if

that is all the agreement contemplated; and he is not entitled on the facts alleged to be relieved from his formal appearance and acts in accordance with the statute before the county judge in the adoption proceeding. The original adoption presumably was made in the form and manner required by the statute and the plaintiff having failed to show facts invalidating it, is not entitled to have the order canceled. Thus the entire theory of his complaint fails for the second adoption order, which was made by the surrogate of Kings county on the 21st day of September, 1908, was made on the duly executed and acknowledged consent of the plaintiff's mother who was then the foster parent of the defendant and by it defendant was duly adopted by the plaintiff's sister. The complaint contains other allegations with respect to facts which transpired after the original adoption upon which he claims that the second adoption was fraudulent and void; but it is not alleged that any fraud or deception was perpetrated on the foster parent, and any fraud or deception that may have been practiced upon plaintiff is immaterial for his consent to the second adoption was not required. Plaintiff's sister, the second foster parent of the defendant, died, leaving a last will and testament giving half of her residuary estate to the defendant and the income from the entire residuary estate to her when she attained the age of thirty years and appointing said York sole executor without bond and testamentary guardian of the defendant, and a codicil modifying the will by giving the defendant only the income from the entire residuary estate for life. Plaintiff alleges that said York and his father, who was also an attorney, procured the execution of the will by undue influence in order that they might obtain possession and control of the estate and that said York procured the execution of the codicil by undue influence in order that he might have control of the residuary estate and of the income thereof and for that purpose had it provided in the codicil that his disposition of the income should not be questioned by any person or in any court and that he induced the testatrix to appoint him testamentary guardian for the same purpose. Plainly those allegations have no bearing on the validity of the adoption orders. Since the allegations of the complaint are insufficient on any theory to warrant the annulment of

the adoption orders, it is unnecessary to consider whether, otherwise, the action might be maintained against the infant as a sole party defendant and with respect to whose conduct in the premises no charge is or, owing to her age at the time, could be made.

It follows that the order and judgment should be affirmed, with costs.

CLARKE, P. J., DOWLING, MERRELL and GREENBAUM, JJ.,  
concur.

Judgment and order affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* DENNIS E.  
CONNERS, Respondent, *v.* THE BOARD OF EDUCATION OF  
THE CITY OF NEW YORK, Appellant.

First Department, May 27, 1921.

**Municipal corporations — mandamus to compel return of deposit made by relator on filing bid for construction of school building — general appropriation for construction of school buildings — bidder could not withdraw bid where general appropriation was greater than bid though estimated cost of building was less — defendant entitled to reasonable time to accept bid — when mandamus not appropriate remedy.**

In mandamus proceedings instituted by a contractor to compel the defendant to return money deposited with a bid for the construction of a school building, it appeared that the board of estimate and apportionment of New York city created and made a general appropriation for the construction of fireproof school buildings; that the defendant adopted a resolution approving plans and specifications for the construction of additions to and alterations in one of the school buildings in New York city and estimated the cost at \$600,000, which action was approved by the board of estimate and apportionment, the cost of construction to be chargeable against the general appropriation; that the relator submitted a bid for the performance of the work at a price in excess of the estimated cost, accompanied by a deposit as required; that the defendant shortly thereafter adopted a resolution subject to favorable action by the board of estimate and apportionment awarding the contract to the relator but did not notify him thereof; that thereafter the board

of estimate and apportionment approved the form of contract and increased the estimate of cost to the amount of relator's bid; that then the defendant adopted a resolution appropriating the amount of relator's bid from said general appropriation; that thereafter the relator withdrew his bid and requested the return of the deposit, which act was not acquiesced in by the defendant, and that the defendant forfeited relator's deposit on his failure thereafter to execute the contract.

*Held*, that the relator did not have the right to withdraw his bid and demand a return of the deposit on the ground that the appropriation for the work in question was not sufficient to cover the amount of his bid, for the general appropriation made by the board of estimate and apportionment was sufficient though the estimated cost of the particular building was too low, and the consent of the board of estimate and apportionment was required not to increase the appropriation but to increase the estimated cost which limited the amount the defendant was authorized to use out of the appropriation without further action by the board of estimate and apportionment.

The general appropriation being sufficient to cover the cost of the work, the bid by the relator was not invalidated by the fact that it was in excess of said amount.

Under the reserved power to reject any and all bids, the defendant was at liberty, if it saw fit, to reject them all as excessive; but deeming the relator's bid to have been reasonable, the defendant was at liberty to hold it under consideration and to endeavor to obtain the consent of the board of estimate and apportionment to its acceptance.

The defendant was entitled to a reasonable time after the receipt of the bids to determine whether the lowest bid was reasonable and should be accepted provided the board of estimate and apportionment would approve thereof at the increased cost, and to enable it to obtain such approval, and under the express terms under which the bids were invited and received, the relator had no right to withdraw his bid while it was being considered, unless final action thereon was delayed for an unreasonable length of time.

It cannot be said, as a matter of law, that a delay of thirty-nine days in accepting relator's bid was unreasonable, and, therefore, mandamus is not the appropriate remedy, for it will lie only where there is a clear legal right to the relief demanded.

APPEAL by the defendant, The Board of Education of the City of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 18th day of February, 1921, granting relator's motion for a peremptory writ of mandamus requiring respondent to return or pay over to the relator \$16,000, deposited by him with a bid for con-

struction work, for which it invited proposals, and interest thereon.

*Joseph L. Pascal* [*John P. O'Brien, Corporation Counsel*],  
for the appellant.

*M. Carl Levine*, for the respondent

LAUGHLIN, J.:

On the 30th day of December, 1918, the board of estimate and apportionment created and made a *general* appropriation of \$5,575,000 for the construction of fireproof school buildings by the adoption of a resolution authorizing the issuance of bonds therefor and appropriating the proceeds of the bonds thereto, and in like manner provided for an appropriation of \$2,062,500 for heating, ventilating, plumbing, sanitary appliances and an electrical plant and equipment for the buildings and \$412,000 for furniture and school equipment therefor. The resolution provided that the amounts to be expended therefrom were "to be sub-authorized from these appropriations by the Board of Estimate and Apportionment predicated upon requisition from the Board of Education for stated amounts to cover the cost of constructing, etc., the foregoing school buildings," and further provided that no incumbrance by contract or otherwise should "be made against these authorizations" and that bids upon contemplated contracts should not be advertised for until after the approval of the board of estimate and apportionment of the plans, specifications and estimated costs and form of proposed contracts for the improvements. It is stated in the points submitted by the corporation counsel that this appropriation was authorized by the board of aldermen and that such authorization was essential to its validity. That argument is doubtless based on section 47 of the Greater New York charter (Laws of 1901, chap. 466, as amd. by Laws of 1916, chap. 615), but section 169 of the charter (as amd. by Laws of 1916, chap. 615)\* appears to empower the board of estimate and apportionment to act alone in authorizing an appropriation by the issuance of such bonds, and since that point is neither presented by the record nor

\* Since amd. by Laws of 1920, chaps. 589, 960.—[REp.]



essential to the decision, we express no opinion thereon. On the 6th of August, 1919, defendant duly adopted a resolution approving plans and specifications for the construction of additions to and alterations in the Newtown High School and estimating that the cost would be \$600,000; and on the twenty-fifth of that month through its vice-president, by formal communication submitted to the board of estimate and apportionment for approval the plans and specifications for the work, stating the estimated cost thereof as \$600,000 and that it would be chargeable as an authorization against said general appropriation and that the plans and specifications had been duly approved by it. The deputy and acting comptroller on the 13th of September, 1919, pursuant to authority delegated to the comptroller by a resolution of the board of estimate and apportionment duly adopted on the eighteenth of July, approved the plans and specifications and on that day formally communicated his approval to the defendant with a proviso that if no bid should be received for the work within the estimated cost, the amount of the estimated cost might be reconsidered by the board of estimate and apportionment, in its discretion, or by any official designated by it, provided that there should be a bid within the amount authorized and available for the work. Defendant thereupon advertised for bids requiring that they be accompanied with a certified check for \$16,000. The advertisement also provided that no bid should be withdrawn pending the award of the contract by the defendant. On the 12th of January, 1920, the relator submitted to the defendant a bid for the performance of the work for \$794,000 accompanied by a check for \$16,000 as required. This was the lowest bid. There were two other bids, one \$5,000 and the other \$93,000 higher. On the fourteenth of the same month the defendant adopted a resolution, subject to the favorable action by the board of estimate and apportionment, awarding the contract to the relator at his bid, but did not give him notice thereof. On the twenty-third of January the board of estimate and apportionment by resolution approved the form of contract, specifications and plans which had theretofore been approved by the deputy and acting comptroller and an increased estimate of cost of \$794,000 for the work and provided that the cost

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should be charged as an authorization against the general appropriation theretofore authorized by the board of estimate and apportionment for the general construction of fireproof school buildings, which were subject to authorization of the stated amount to be expended in the construction of each specific school to be predicated upon requisition by the defendant to the board of estimate and apportionment, and that such approval and increased estimated cost were in substitution for the approval at an estimated cost of \$600,000, theretofore granted by the deputy and acting comptroller "consequently increasing the sub-authorization against such general appropriations from \$600,000 to \$794,000." On the 11th of February, 1920, the defendant adopted a resolution appropriating the sum of \$794,000 from said general appropriation to be applied in payment of the contract to be entered into with the relator for that amount for the general construction of additions to and alterations in the Newtown High School and making requisition on the comptroller for that amount, but at that time gave no notice thereof to the relator. On the nineteenth of that month the relator wrote the defendant referring to his bid and to the fact that no award of the contract had been made and stating that since the bids were opened, there had been a substantial increase in the cost of the work and that he, therefore, withdrew his bid and requested the return of the deposit. On the twentieth of February defendant, through its secretary, wrote the relator referring to his letter of the day before and stating that the contract for the work was awarded to him by the defendant subject to the approval of the board of estimate and apportionment and that upon notification of favorable action by that board, defendant on the eleventh of February, adopted a resolution making the necessary appropriation to carry out the relator's contract for the work and that his bid had been forwarded to the comptroller, whose approval of surety was required before the contract could be executed; and by another like communication on the same day, defendant notified the relator that on the 11th of February, 1920, the superintendent of school buildings recommended the acceptance of his bid and the recommendation was approved and ratified by the defendant and the contract was awarded to him subject to the approval of

sureties and the execution of the contract and certification thereof by the comptroller, and calling upon him to present his sureties to the comptroller for qualification within five days and specifying the amount of the bond required. These two communications were received by the relator the next day. On the twenty-eighth of February defendant sent another communication to the relator stating that on the twenty-fifth of February defendant considered his communication dated February twentieth withdrawing the bid and requesting the return of the deposit and decided not to permit the withdrawal of the bid and denied his request for the return of the deposit. The record does not show that the relator presented two communications requesting the withdrawal of the bid and the return of his deposit, but whether the last letter referred to relates to the original request or another is immaterial. On the 1st of March, 1920, the attorney for the relator wrote the defendant referring to its communication to the relator of the twentieth of February, regarding the withdrawal of his bid and stating that his understanding was that the reason the contract was awarded to his client subject to the approval of the board of estimate and apportionment was the lack of an appropriation or that the amount appropriated for the work from the general appropriation was insufficient and that it became necessary to apply for an increase "in the allotment" and inviting attention to certain authorities under which he claimed that without regard to whether or not the relator was entitled to withdraw his bid, the contract could not be awarded to him for the reason that the appropriation was insufficient at the time the bids were received. On the sixth of March defendant notified the relator that it was in receipt of a communication from the department of finance stating that he had not presented a surety as required and drawing his attention to section 419 of the Greater New York charter, which provides that if a bidder whose bid has been accepted shall neglect or refuse to accept the contract within five days after written notice that it has been awarded to him or if he accepts but does not execute the contract and give the proper security, the work shall be readvertised and relet, and requesting him to give the matter his immediate attention. (See Laws of 1910, chap. 554,

amdg. Greater N. Y. Charter, § 419.) On the 30th of March, 1920, defendant transmitted to the relator a copy of an opinion received by it from the corporation counsel under date of March first, in which he considered the authorities cited by the attorney for the relator and conceded that if at the time the bids were received there was not a sufficient appropriation the award of the contract would be invalid, but he maintained that the general appropriation of \$5,575,000 was available for this work and that the original estimated cost did not constitute a limitation of the appropriation and that the board of estimate and apportionment was at liberty to approve an increased estimate of cost sufficient to meet the relator's bid, as it did, and that if the relator failed to execute the contract his check would be forfeited. On the 30th of April, 1920, defendant transmitted to the relator a certified copy of a resolution adopted by it on the twenty-eighth of April, reciting the proceedings on his bid and declaring the security deposited by him forfeited and authorizing the superintendent of buildings to readvertise the work.

The authorities on which the relator relies hold that there must be sufficient appropriation at the time the bids are received in order to warrant the letting of a contract. (*Williams v. City of New York*, 118 App. Div. 756; *affd.*, 192 N. Y. 541; followed, *People ex rel. Carlin Const. Co. v. Prendergast*, 220 *id.* 725; *Clarke Co. v. Board of Education*, 156 App. Div. 842; *affd.*, 215 N. Y. 646; *Klinck v. Pounds*, 163 N. Y. Supp. 1008.) Here, however, the appropriation was sufficient but the estimated cost was too low and the consent of the board of estimate and apportionment was required, not to increase the appropriation, but to increase the estimated cost which limited the amount the defendant was authorized to use out of the appropriation without further action by the board of estimate and apportionment.

*Williams v. City of New York* (*supra*) is plainly distinguishable from the case at bar on the ground that there the lowest bid when received exceeded the appropriation available for the work, and in order to create a sufficient appropriation to cover the lowest bid, it became necessary for the board of estimate and apportionment and the board of aldermen to authorize the issuance of corporate stock, thus creating an

additional appropriation. That action was brought by the lowest bidder to recover of the city damages for the loss of the profits he would have made on the contract if awarded to him, and it was held that the bid being in excess of the appropriation was invalid and that the subsequent increase of the appropriation by the issuance of corporate stock did not inure to the benefit of the plaintiff and that his bid was properly rejected. Here, as the corporation counsel advised the defendant, the \$5,575,000 had been duly appropriated and was available for this contract work; and the bid was not invalidated by the fact that it was in excess of the amount estimated as the cost of the work. That estimate was doubtless required to be made in the expectation that bidders would keep within it and thus it was intended as a check on bidders and as a limitation also on the authority of defendant to award the contract. Under the reserved power to reject any and all bids, defendant was at liberty, if it saw fit, to reject them all as excessive; but deeming the relator's bid reasonable, it was at liberty to hold it under consideration and to endeavor to obtain the consent of the board of estimate and apportionment to its acceptance, as it did. It cannot be said that the bid was invalid on the theory that it was in excess of the appropriation for the work because the estimate of the cost of the work did not constitute the appropriation therefor. A sufficient general appropriation had been made and it was not essential that the sub-appropriation be made until the precise amount required should be determined.

I am also of opinion that *Clarke Co. v. Board of Education* (*supra*) is not in point for there the appropriation was not a general appropriation, but in and by the appropriation a specified amount was appropriated for the construction of specified school buildings, which made the appropriation precisely the same as if the only appropriation was for the particular school building with respect to the construction of which the point arose. That, also, was an action by a contractor for the recovery of prospective profits on the theory that it was entitled to have the contract awarded on its bid. In that case the board of education had requested a general appropriation of a lump sum for the erection, equipment and improvement of school buildings and premises but the appro-

priation was not so made; and the board of education was requested by the comptroller, in line with the established policy for certain other departments, to itemize the appropriation required for specific buildings, and subsequently on receiving information from the board of education with respect to the requirement for the particular buildings, the board of estimate and apportionment authorized the issuance of corporate stock not exceeding the specified amount to "provide means for the construction and improvement of public school buildings and additions thereto as follows;" and this was followed by a detailed schedule specifying the amount appropriated for each building and the resolution provided that the proceeds of the issuance of corporate stock should "be applied to the purposes aforesaid." The resolution was concurred in by the board of aldermen and approved by the mayor. Among the items of that appropriation was one of \$182,000 for Public School 92. Plans and specifications for that building were prepared and duly approved and bids invited therefor and the lowest bid received was for \$99,000 more than the appropriation. Defendant undertook to accept the bid by a resolution to the effect that it was accepted "subject to financial ability;" but thereafter the contractor was notified that the appropriation for the building of the school was insufficient and that the conditional award to him was withdrawn for the reason that there was no appropriation therefor. This court held that there was no valid acceptance of the bid and that the board had no right to make the conditional acceptance because the bid exceeded the amount appropriated for the work, and it was also held that the provisions of section 1541 of the Greater New York charter forbidding any department, board or officer to incur any expense unless an appropriation shall have been previously made covering such expense or "any expense in excess of the sum appropriated in accordance with law," applied to the board of education and restricted its authority. Section 877 of the State Education Law (as added by Laws of 1917, chap. 786) is in effect the same as said section of the charter (as amd. by Laws of 1910, chap. 543). I am, therefore, of opinion that the defendant was entitled to a reasonable time after the receipt of the bids to determine whether the lowest bid was reasonable and should be accepted provided

the board of estimate and apportionment would approve thereof and to enable it to obtain such approval of the board of estimate and apportionment, and that under the express terms under which the bids were invited and received, the relator had no right to withdraw his bid while it was being considered unless final action thereon was delayed for an unreasonable length of time. Subsequent to the receipt of these bids, the Legislature, by chapter 856 of the Laws of 1920, added section 86-c to the General Municipal Law authorizing the withdrawal of bids and of deposits made therewith where a contract is not awarded within forty-five days after the receipt of the bids. If that enactment were applicable, it would not have authorized the withdrawal of the relator's bid, for the resolution awarding the contract to the relator after the board of estimate and apportionment approved was adopted on the thirtieth day after the receipt of the bids and he received formal notice that the contract had been awarded to him on the fortieth day. The only theory on which the relator would be entitled to withdraw his bid and to the return of his deposit is that the defendant took an unreasonable period of time in considering the award of the contract. If it could be said as matter of law that the period was unreasonable, the order for the issuance of the mandamus might be sustained (*Matter of Harvey v. Duffey*, 101 Misc. Rep. 641; *affd., sub nom. People ex rel. Harvey v. Duffey*, 182 App. Div. 903; *Gunnison v. Board of Education*, 176 N. Y. 11; *Dannat v. Mayor*, 66 id. 585); but I deem it quite clear that it cannot be so held. The facts essential to a decision on that point have not been shown. There is no competent evidence of any change in the cost of construction. There is merely the relator's statement to that effect in the letter in which he attempted to withdraw his bid; and there is no evidence with respect to the times of meetings either of the members of the defendant or of the members of the board of estimate and apportionment, or of the time required for such investigation as they may have deemed essential to guide their action in the premises. Mandamus is an appropriate remedy only where there is a clear legal right to the relief demanded. (*People ex rel. Lentilhon v. Coler*, 61 App. Div. 223; *People ex rel. Ajas v. Board of Education*, 104 id. 162; *People ex rel. Rolf v. Coler*,

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58 id. 131.) It follows, therefore, that the order should be reversed, with ten dollars costs and disbursements, and motion denied, with fifty dollars costs.

CLARKE, P. J., DOWLING, MERRELL and GREENBAUM, JJ.,  
concur.

Order reversed, with ten dollars costs and disbursements,  
and motion denied, with fifty dollars costs.

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JAMES W. KING, Respondent, v. INTERBOROUGH RAPID  
TRANSIT COMPANY, Appellant.

First Department, May 27, 1921.

**Street railways — action for damages by passenger, who, while standing on elevated railway platform, was struck by bundle of newspapers thrown by third person from passing train — defendant not liable for act of third person — negligence on part of defendant not shown — res ipsa loquitur not applicable.**

The plaintiff, who had purchased a ticket and entered on the elevated platform at one of defendant's stations, was waiting for a train when a bundle of newspapers was thrown from a passing train, striking him and causing the injuries for which this action was brought. It appeared that the Public Service Commission had formulated rules regulating the carrying of bundles of newspapers on elevated trains, one of which prohibited the throwing of bundles from trains while in motion, and that the conductors and guards were instructed to stand on the car platform while a train was passing a station and not to permit bundles of papers to be thrown from the train.

*Held*, that the defendant, in the absence of negligence chargeable to it, was not liable for the act of a passenger on its train in throwing a bundle of newspapers therefrom, which was the proximate cause of the injury.

There was no proof by the plaintiff of any course of conduct in regard to throwing bundles from moving trains at the station in question or any other, which would bring home to the defendant knowledge of a course of action upon the part of carriers of papers so as to charge it with responsibility, and furthermore the defendant had done all that it could be expected to do to prohibit the throwing of bundles from trains.

There was no proof that defendant's train approached the platform in question at a high and reckless rate of speed as alleged by the plaintiff, nor that it so passed the platform.



The absence of a guard on the platform of the car from which the papers were thrown cannot be said to have been the cause of the accident.

The doctrine of *res ipsa loquitur* has no application to this case, since that doctrine applies only where the instrumentality through which the accident happens is solely and entirely under the control of the defendant.

GREENBAUM and MERRELL, JJ., dissent, with opinion.

APPEAL by the defendant, Interborough Rapid Transit Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 1st day of December, 1920, on the verdict of a jury for \$1,500, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

*James L. Quackenbush* [*A. H. Cole* of counsel], for the appellant.

*James A. Beha* [*John J. Cunneen* with him on the brief], for the respondent.

DOWLING, J.:

The complaint herein sets forth that on October 23, 1918, and for a long time prior thereto the defendant, its agents, servants and employees, recklessly, carelessly and negligently permitted and assisted in the distribution of packages of newspapers along the lines of its Third Avenue elevated railroad, and recklessly, carelessly and negligently permitted its agents, servants and employees and others to throw or hurl bundles of newspapers from the platform of its trains to the platform of its station along its tracks while the said trains were passing said station platforms at a high and reckless rate of speed. It then averred that about one P. M., on the 23d day of October, 1918, plaintiff entered upon the defendant's elevated structure at Eighteenth street and Third avenue, in the city of New York, on the east side of the avenue, and after paying his lawful fare entered upon the platform of the station adjoining the uptown track, and while standing on the platform of the station and awaiting a train upon which to go uptown, for which purpose plaintiff became a passenger of the defendant company and had paid his lawful fare, one of the trains of the defendant company approached the station

at a high and reckless rate of speed and passed the station and platform at such a rate of speed without stopping, and the defendant, its agents, servants and employees, recklessly, carelessly and negligently, and while said train was passing at such high and reckless rate of speed, threw or permitted to be thrown to defendant's platform, where plaintiff was standing, a large bundle of newspapers, which bundle of newspapers struck the plaintiff, causing him to be thrown to said platform, severely injuring him; all to his damage in the sum of \$10,000. It was further alleged that plaintiff was not guilty of any contributory negligence.

Upon the trial the testimony offered in behalf of plaintiff was limited to the specific occasion upon which the accident happened and there was no attempt made to prove the allegations of the complaint that for a long time prior to the date in question defendant had permitted its employees to assist in the distribution of packages of newspapers along the line of its railway in a negligent manner or that it had negligently permitted its employees and others to throw bundles of newspapers from the platforms of its trains to the platforms of its stations, while the trains were passing the platforms at a high and reckless rate of speed.

It appeared upon the trial that the Public Service Commission on August 24, 1915, had approved certain rules and regulations of the defendant in relation to the method of carrying bundles of newspapers, applicable both to its subway and elevated lines. These regulations varied according to the hour when the papers were carried upon the trains, but in a general way they provided for the size of the bundles, that they should be furnished with a strap and a handle by which they might be carried, each person to carry not more than two bundles; that a fare was to be collected for both the carrier and the bundles; that not more than one carrier in charge of two such bundles was to be permitted on the front platform of the rear car, and another carrier with two bundles on the rear platform of the car next to the rear car; that not more than two carriers and four bundles were to be allowed on any train between the hours of seven and ten A. M. and four and seven P. M., but there was no restriction as to

hours apart from these. The 6th rule provided that the bundles were to be deposited on the car platform at the points indicated by the guards and were to be carried off the train, by the person carrying them, with one bundle in each hand. The 8th rule provided that the throwing of bundles or packages of papers from trains was strictly prohibited and offenders would be liable to arrest.

The plaintiff called as his first witness William C. Russell, an instructor of motormen, conductors and guards at the school maintained by defendant for training its employees, and he testified that instructions were given in the school to keep the gates closed, and never open them while a train was in motion; that the men were instructed to stand on the car platform until the train was away from the station, and never to allow any newspapers to be thrown from the platform of a car of the train at any time until the train came to a stop. In passing stations the guard was directed to stand on the car platform until the train was out of the station. Certain rules of the defendant were read in evidence by plaintiff's counsel as follows:

"Rule 579: All trains must carry a conductor or guard on the rear car."

"Rule 577: Trainmen must always be at their posts on the car platform when the train is at or passing station platforms, and must only enter car as provided in the rules, or in the line of duty."

"Rule 608: \* \* \* Motormen receiving orders to skip stations must blow whistle signal before entering station to warn passengers or employees that the train is not to stop. Maximum speed allowed passing stations without stop is 18 miles an hour."

The plaintiff testified that on October 23, 1918, at one P. M., he went to the Eighteenth street station of the defendant's Third Avenue elevated railroad, bought his ticket, dropped it in the box and went upon the platform to await an uptown train. He saw no train in sight and was informed by the agent that there was a block on the road but that trains were running and would be along in a few minutes. Three or four trains passed without stopping and from one of these, either the third or fourth (he is not certain which), a bundle

was thrown as he was facing the train and struck him on the left ankle, threw him down, stunned him, and caused his hat to roll onto the tracks. There was no break in the skin on his arm but it swelled up. He went to the agent and informed him that he had been struck by a bundle of newspapers and that they were picked up by a man who was waiting there. He testified that the train was going from fifteen to seventeen miles an hour as it passed. When he first saw the bundle of papers it was from a distance of thirty to thirty-five feet, and he saw a young man laying them on the edge of the gate which protects the car platform. When they were thrown they dropped on the platform and rolled until they struck him. They were pushed out from the top of the gate. He saw no guard on that platform of the car, which was the front platform of the last car of the train. There was no other person thereon. The plaintiff, on cross-examination, testified that he went uptown on the next train and from there to his doctor's office. He described the bundle of papers as being about the size of a brief case and said it was pushed from the train as it reached the end of the station and then rolled until it struck him. He identified the person who picked up the papers as one Braunstein who, when plaintiff told him that he had been hit by them, said they were his papers. There was no one between the plaintiff and the bundle of papers as it was pushed from the train and he was back against the railing and did not think they would reach him. This constituted all the testimony for plaintiff, save that as to the nature of his injuries.

For the defendant it was shown that the order of the Public Service Commission was posted on the bulletin boards for trainmen and conductors to read and observe. The station master, Schorsch, testified that plaintiff had reported to him that a bundle of papers had been thrown off and hit him on the arm, but he could see no mark thereon when it was shown to him. On cross-examination he testified that two trains had gone by without stopping and that the train in question was the third train which had so passed. He admitted that Braunstein was there waiting for his papers. Conniff, the defendant's train dispatcher at South Ferry, was called to give the number of the last car of this train, which he had ascertained as soon as he received word over the telephone

from the station agent of the claimed accident. Stietz, the conductor in charge of the third train which skipped the station stop at Eighteenth street at the time in question, was called to testify that no accident had been seen or reported by him. He also testified to his knowledge of the rules and as to the instruction received thereupon. Braunstein, the newsdealer, who was on the platform waiting for his papers, said he was waiting inside and saw the train pass and when he went out he saw his bundle and a man who claimed that the bundle had hit him. The bundle bore the witness's name and contained papers for three dealers, in all about forty. The witness Kramer, who at the time in question was the regular deliverer of papers for Duhan, testified that he was the only one who made deliveries for him during the month of October, 1918, and that he never threw papers off while the train was in motion but he waited until the train stopped and then walked off and put them alongside the railing. On cross-examination he swore he did not throw any papers off at the time in question. Duhan, employer of the witness Kramer, testified that he had instructed his employees that if they threw papers off a moving train they would be liable to arrest and that he had given such specific instructions to Kramer. He swore that on the day in question he was with Kramer and that Kramer left the train at this station and put them on the platform. It was also shown by the witness Erickson that this was what is known as a "No Report Case" and that no report of the accident came from any one save the station agent. Allaire, the guard who was claimed to have been in charge of the rear car of this particular train, swore that there were no papers aboard the train and that no accident had happened of which he heard.

The case thus is reduced to that of a passenger of the defendant railroad who, while waiting for a train to arrive on which he intends to take passage, is injured by a bundle thrown from an approaching train which passes the station without stopping. While the identity of the person who threw the bundle from the train is not shown, it does appear that he was a young man and there is no claim that he was a guard or other employee of the defendant railroad. Of course, the defendant is not liable for the act of a passenger

who throws some object from the train. As none of its employees is charged with having thrown the bundle, the sole theory of its liability must be that it was guilty of some negligence which caused the accident. The plaintiff concedes that he has not shown any course of conduct in regard to throwing bundles of papers from moving trains at the station in question or any other, which would bring home knowledge to the defendant of a course of action upon the part of carriers of these papers which would charge it with responsibility. There was not the slightest effort made to prove that this was actually done or that defendant had knowledge of such a violation of its rules. As a matter of fact it had done all that it could be expected to do to prohibit the throwing of bundles from its train. But plaintiff claims that he has established the cause of action set forth, not in the third paragraph of his complaint, but in the fourth. This alleges that while the plaintiff was a passenger of the defendant one of its trains approached the station at a high and reckless rate of speed and passed the station without stopping and that defendant, its agents, servants and employees recklessly, carelessly and negligently, and while said train was passing at such high and reckless rate of speed, threw or permitted to be thrown to defendant's platform, where plaintiff was standing, a large bundle of newspapers which struck the plaintiff. There is no proof that the train was approaching the platform at a high and reckless rate of speed, nor that it so passed the platform. As has been said, plaintiff concedes that there is no proof that any of defendant's employees threw this bundle off the train. Therefore, even under this paragraph of the complaint, the claim of negligence is reduced to the proposition that the defendant negligently permitted this bundle to be thrown off the train. Accepting plaintiff's testimony that there was no other person on the front platform of the rear car save the young man who threw the papers off, then the defendant must be held, if at all, upon the theory that the absence of the guard from the front platform was the cause of this accident. That is purely speculative and it does not seem to me that it could possibly be said to be the cause of the accident. If there had been a guard upon the platform in question and he had permitted the carrier

of the papers to throw them off, a different situation would arise; but there is not the slightest suggestion that the guard, if not upon the platform, may not have been about some proper business of the company in the car; and in any event, even if he knew that the papers were on the front platform of the car in the place they were required to be under the rules, that is, in such a position that no passenger would stumble over them (which would necessitate their being on the side of the car farthest from the gate over which they were thrown) upon this record he had no reason to believe that the carrier of the papers would attempt to violate the rules and subject himself to arrest by throwing the papers off while the train was moving.

Upon this record, the proximate cause of the accident was the unlawful act of the carrier of the papers, with which the defendant had no connection and which it is not shown it could have prevented, or that it had reason to believe that any such act would take place. Of course, all this is upon the assumption that the plaintiff's testimony is a correct and complete statement of what transpired and entirely disregards the opposing testimony for the defendant.

I am of the opinion that the plaintiff has failed to make out the cause of action set forth in his complaint and has failed to establish any negligence on the part of the defendant.

The doctrine of *res ipsa loquitur*, it seems to me, has no application to a situation such as this case presents. That doctrine applies only where the instrumentality through which the accident happens is solely and entirely under the control of the defendant. Here, the bundle of newspapers which caused the accident had never been in the custody of the defendant but of the employee of a third person over whom the defendant had no control. It is no different in its essential particulars from any other case where an object is thrown from a moving train which causes the injury. Unless that object is shown to have been thrown by some employee of the defendant or that it was an object which was part of the defendant's equipment or property, the burden is still upon the plaintiff to show whose negligence caused the accident and there is no assumption that it necessarily was that of the defendant.

The judgment and order appealed from should be reversed, with costs to appellant, and the complaint dismissed, with costs.

CLARKE, P. J., and LAUGHLIN, J., concur; MERRELL and GREENBAUM, JJ., dissent.

GREENBAUM, J. (dissenting):

Plaintiff does not claim that an employee of the defendant threw the bundle of papers which struck him, but concedes that it was thrown upon the platform by a carrier of the newspapers which were daily deposited on the various stations of the defendant railroad with the knowledge and sanction of the defendant.

The case was submitted to the jury upon the theory that the defendant owed a duty to the plaintiff as a passenger, who was lawfully on the platform awaiting an opportunity to board one of its trains, not only not to permit the person who had charge of the delivery of bundles of papers to throw a bundle from the train while in motion, but also to exercise reasonable care to prevent such an act.

Plaintiff testified that the guard was not on the front platform of the last car when the train was passing the station and there is no testimony to the contrary. Nor is he contradicted in his statement that he immediately after the accident talked with the station agent, one Schorsch, and one Braunstein, the newsdealer, about the accident. He also testified that three or four trains passed the station without stopping and that the bundle came from one of these trains. He established by the testimony of one Russell, an employee of the defendant and an instructor of its motormen, guards and conductors, that the conductors and guards must never allow newspapers to be thrown from the platform of a car at any time, and must never allow them to be removed from the cars until the train has come to a full stop; that it was the duty of the guard to be on the platform when a train passed a station without stopping, all of which are set forth in the company's book of rules which was introduced in evidence. Plaintiff also put in evidence an order of the Public Service Commission which recites: "That the following rules and



regulations of the Interborough Rapid Transit Company on its subway and elevated lines be and the same hereby are approved." *Inter alia*, the sections of the order provide: "3. One carrier with two of these bundles, one carried in each hand, will be allowed to enter the station and pass by the chopping box after depositing one ticket for himself and one ticket for the two bundles. 4. Not more than one carrier in charge of two such bundles will be permitted to ride on the front platform of the rear car of each train and another carrier with two bundles permitted to ride on the rear platform of the car next to the rear car. \* \* \* 6. The bundles are to be deposited on the car platform at the points *indicated by the guards* [italics ours] and are to be carried off the train with one bundle in each hand. \* \* \* 8. Throwing of bundles or packages of paper from trains is strictly prohibited and offenders will be liable to arrest. 9. In depositing bundles or packages on the station platform they must be so placed that passengers entering or leaving the car cannot stumble or fall over them."

The next to the last section provides: "For the information of all employees: Badges will be issued to the newspaper carriers," etc., ostensibly to enable the guards to identify the carrier in charge of newspaper bundles on his car. The order also requires the employees to report any breach of these regulations, but does not indicate to whom the report shall be made.

Defendant called as witnesses a guard named Allaire and a conductor named Stietz, who were on one of the trains that had passed Eighteenth street without stopping at about the time of the accident. Stietz testified that his train had skipped Eighteenth street, but that he did not know whether it was the last train to pass the station without stopping and further that he did not see any bundle of papers thrown from his train and that he knew nothing of the accident. Allaire stated that he was the guard on the last car of his train; that his train skipped Eighteenth street; that nothing was thrown from the platform; that he was standing on the platform when the train passed the station and that there were no papers on the platform of his car at all.

Adolph Schorsch, the defendant's station agent at the

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Eighteenth street station at the time of the accident, testified that the plaintiff complained to him of the injury immediately after the accident and that he thereupon telephoned to the train dispatcher to ascertain the number of the train from which the bundle was thrown; and that the newsdealer was in the habit of getting his papers regularly every day upon the platform. Schorsch was not permitted to testify what the dispatcher told him, but one Conniff, a train dispatcher, testified that in answer to Schorsch's telephone inquiry, he told him that the number of the car was 1599. It is important to note that the witness Conniff answered the court's query, "Q. How do you know a train skipped the 18th Street station?" by saying, "I have no knowledge of that, your Honor."

Braunstein, the newsdealer, was called by the defendant and testified: "I see my bundle there and a man claimed they hurt him, the bundle. When I came outside, the train was passed and I find the bundle there on the platform." Adolph Kramer, the carrier in charge of the bundles, testified that he was the only one who delivered papers to Braunstein at the Eighteenth street station at the time of the accident, but that the bundle was not thrown from the train. However, he failed to explain how it came to be on the station platform if the train did not stop, but testified: "Q. You did not throw this bundle off at 18th Street, did you? A. I did not throw off. I don't know. I put off the papers. I did not throw off any papers."

We thus see from the testimony of the defendant's own witnesses that the defendant had received information as to the accident and was, therefore, in a position to ascertain and produce the guards or conductors who were on the trains which did not stop at Eighteenth street. Nevertheless, only two trainmen were called by the defendant. In view of the fact that three or four trains had passed Eighteenth street at about the time of the accident without stopping and that no testimony was given showing why the trainmen on other trains were not called, or from what train the bundle came, it was proper for the jury to consider these important circumstances in passing upon the question of defendant's negligence.

If the defendant's guard was on the platform at the time of the accident, that fact should have been established and

in that event it should have been shown what efforts, if any, he made not to permit the bundle of papers to be thrown off. If he was not on the platform when the train was passing the station as the plaintiff testified, that fact would be *prima facie* evidence of the defendant's negligence. This conclusion is justifiable because of the rules which required the presence of the guard on the platform of the car from which the bundle was thrown and which imposed upon the guard an affirmative duty to indicate to the carrier of the papers where the bundles were to be deposited. Besides, when an official becomes aware of the presence of a passenger on the train who has a number of bundles for the purpose of depositing them at various stations, there is a legal obligation to see to it that the removal of the bundles should not be a menace to the safety of passengers.

The doctrine of *res ipsa loquitur* is peculiarly applicable to the facts of this case. That rule is well stated in 29 Cyc. 591: "Perhaps a more accurate statement is that where the defendant owes to plaintiff a duty to use care, and the thing causing the action is shown to be under the management of the defendant or his servants and the accident is such that in the ordinary course of things does not occur if those who have the management or control use proper care, the happening of the accident in the absence of evidence to the contrary is evidence that it arose from lack of requisite care." (See *McNulty v. Ludwig & Co.*, 153 App. Div. 206, citing *Griffen v. Manice*, 166 N. Y. 188.)

The defendant owed the plaintiff a duty to provide a safe place for him to await the coming of the train. Moreover, there is no doubt that defendant had control and management over the distribution of the newspapers which caused the accident and that the Public Service Commission's order as well as the other rules of the company requiring the guard to be on the platform when a train is in or passing through a station, presumably were promulgated for the purpose of guarding against just such an occurrence as is complained of here.

The appellant's counsel cites a rule from 10 Corpus Juris, 901, as follows: "Unless such agents or servants [of the carrier] know or ought to know that danger from fellow-

passengers exists or is reasonably to be apprehended and can by the use of proper care prevent the injury, the carrier is not liable. Thus the carrier is not liable where the injury is caused by acts of a fellow-passenger which its agents or employees had no reason to apprehend and which they could not by the exercise of proper care prevent."

This is undoubtedly a sound rule and is indeed peculiarly pertinent to the instant case, where it was shown that defendant realized the danger to its passengers in permitting bundles of papers to be delivered at station platforms by the order of the Public Service Commission which promulgated the rules heretofore detailed.

Had the guard been on the platform as the rules provided, he might have prevented the throwing of the newspapers. In *Robinson v. Consolidated Gas Co.* (194 N. Y. 37, 41) the court said: "If the *res*, or the entire occurrence as proved, could not have happened without negligence of some kind, negligence is presumed without showing what kind and the burden of explanation is thrown on the defendant. If, however, proof of the occurrence shows that the accident might have happened from some cause other than the negligence of the defendant, the presumption does not arise and the doctrine cannot properly be applied. Under such circumstances, it is for the jury to find whether the accident was owing to negligence on the part of the defendant, or to some cause for which the defendant was not responsible. The principles upon which the doctrine rests and the circumstances under which it should be applied were so clearly pointed out by Judge CULLEN in *Griffen v. Manice* (166 N. Y. 188), the leading case upon the subject, that further discussion thereof is unnecessary."

Assuredly in the case under review the occurrence as proved could not have happened without negligence of some kind and there can be no question that the defendant has failed to give any explanation from which it may be deduced it was not guilty of negligence.

It is true that the complaint in this action alleged specific acts of negligence and the case was tried on that theory. It is, however, clear from the case of *D'Arcy v. Westchester Electric R. Co.* (82 App. Div. 263) that the plaintiff in an action for personal injuries does not waive the right to rely

on the presumption of negligence arising out of the fact of the accident because he alleged or attempted to prove specific acts of negligence.

I think the verdict of the jury was correct and that the judgment should be affirmed.

MERRELL, J., concurs.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

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In the Matter of the Application of CAROLINE McCOON GUNTHER, Appellant, for the Appointment of a Trustee of the Trusts Created for Her Benefit by the Last Will and Testament of CORNELIUS McCOON, Deceased, in the Place and Stead of FREDERICK W. GUNTHER, Sole Trustee, Deceased.

EDITH McCOON and Others, Respondents, Appellants;  
ROBERT LEE MORRELL, Person Appointed to Execute Trust, Respondent.

First Department, May 27, 1921.

**Trusts — appointment of successor trustee — power of court on death of sole surviving testamentary trustee — vesting of trust in Supreme Court by virtue of Personal Property Law, § 20 — order of appointment should not invest trust property in trustee — discretion of court in appointment of successor trustee — duty of court to respect request of all parties interested for appointment of corporate trustee.**

In the case of the death of a sole surviving trustee of a testamentary trust, the trust, by virtue of section 20 of the Personal Property Law, vests in the Supreme Court and shall be executed by some person appointed by the court who is invested by it with any or all of the powers and duties of the original trustee, but with the trust still remaining vested in the court.

Accordingly, it was improper for the court in appointing a successor trustee of the trusts in question in the place and stead of the deceased sole trustee, to vest him "with all the estate given and bequeathed by said will \* \* \*

as if the said \* \* \* [successor trustee] had been originally named in said will as executor thereof and as sole trustee of said trusts \* \* \*," but the form of the order is a mere irregularity and may be modified to express the statutory character of the power conferred.

While the power is resident in the court alone to appoint an agent to carry out the unexecuted trust, and while the parties in interest cannot upon consent oust the court of its power of selection by compelling it to appoint any one upon whom they may agree, the discretion of the court in appointing an agent should be exercised with due regard to the reasonable wishes of those entitled to the income and ultimate ownership of the principal of the trust fund.

Accordingly, where it appeared in proceedings for the appointment of a successor trustee that the beneficiary under the trust and all persons interested and entitled to the ultimate ownership of the principal of the trust fund asked the court to appoint a specified trust company as trustee and stated as their reasons for desiring the appointment of a corporation as trustee the inconvenience and expense attendant upon the appointment of individuals as trustees due to death or resignation thereof and subsequent appointment of new trustees and the stability in the management and control of the trust estate by a corporation, it was error for the court to appoint an individual as successor trustee contrary to the wishes and express desires of all the parties.

While the court was not bound to appoint the particular corporation selected by the parties as trustee, a corporate agent should have been appointed to carry out the unexecuted trust.

APPEAL by Caroline McCoon Gunther and others from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of January, 1921, appointing Robert Lee Morrell sole trustee of certain trusts created by the last will and testament of Cornelius McCoon, deceased, as successor to Frederick W. Gunther, deceased, sole trustee, and also from an order entered in said clerk's office on the 5th day of January, 1921, denying a motion for a reargument and to vacate said first order and for the appointment of the Guaranty Trust Company as such trustee.

*Wilson W. Thompson* of counsel [*Eastman & Eastman*, attorneys], for petitioner, appellant, Caroline McCoon Gunther.

*William Greenthal*, special guardian for the respondent, appellant, Carolyn Frances McCoon.

*Theodore F. Humphrey* of counsel [*Murray, Ingersoll, Hoge & Humphrey*, attorneys], for the respondents, appellants, Alice McCoon, as general guardian of Carolyn F. McCoon, and Edith McCoon.

*Robert Lee Morrell*, respondent in person.

DOWLING, J.:

The testator, Cornelius McCoon, died on January 13, 1884, leaving a will and six codicils thereto. Thereunder certain trusts were created, including the one giving rise to this proceeding, which was set forth in the 4th paragraph of the will, and was for the benefit of his daughter, Caroline Augusta McCoon, the petitioner herein, now known as Caroline McCoon Gunther, who is entitled to the income of the trust estate for life. The will and codicils were duly admitted to probate by the Surrogate's Court of New York county on January 28, 1884. Thereunder four executors and trustees were appointed, one of whom, Benjamin B. Sherman, never qualified and died on May 2, 1885. The other three executors and trustees qualified and acted, but one of them, Jacob K. Lockman, resigned on April 15, 1887, and died on March 22, 1904. A third executor and trustee, Catharine Adelia McCoon, died on November 24, 1905. The last surviving executor and trustee, James Henry McCoon, son of testator, was subsequently judicially declared to be of unsound mind. His letters testamentary accordingly were revoked by the Surrogate's Court on February 15, 1906; he was removed as trustee by the Supreme Court on July 27, 1906, and he died on December 9, 1906. Thereupon Frederick W. Gunther, the husband of the petitioner was, on July 27, 1906, appointed by the Supreme Court to execute the trust for her and acted in that capacity until his death on February 17, 1920. It was to secure the appointment of his successor as trustee that this proceeding was brought.

The other next of kin of the testator and the remaindermen of Mrs. Gunther's trust estate are Edith McCoon and Carolyn Frances McCoon, the latter an infant over eighteen years of age, they being granddaughters of testator, the only issue of his son James Henry McCoon. The trust fund held for

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Mrs. Gunther's benefit during her life has been increased by one-third of a trust fund created for the benefit of her sister Mrs. Annie A. Waterbury, who died July 17, 1905, without issue.

The trust estate of the petitioner now amounts to \$213,000, all invested in guaranteed bonds and mortgages the gross annual income from which is \$10,130.

On September 30, 1920, the petitioner made application to the Supreme Court for the appointment of a trustee, setting forth in her petition all the facts relating to the trust estate and concluding by stating:

"That by reason of the death of said Frederick W. Gunther who was the sole trustee of said trusts, it has become necessary for the protection and preservation of said trust estates, and for the protection of the interest of your petitioner as life beneficiary thereof, and for the protection of the remainder interests therein of said Edith McCoon and Carolyn F. McCoon, that some competent person or corporation, or both, be appointed by this Court as trustee or trustees of said trusts in the place and stead of said Frederick W. Gunther, deceased.

"Wherefore, your petitioner prays that the Guaranty Trust Company of New York be appointed the new trustee of the trusts created for the benefit of your petitioner, Caroline McCoon Gunther, by the will of Cornelius McCoon, deceased, as successor to, and in the place and stead of the said Frederick W. Gunther, deceased, with all the authority and power given by said will of Cornelius McCoon, deceased, to the executors and trustees therein named, as though the said Guaranty Trust Company had been originally named in said will as Executor thereof and trustee of said trusts; that an order of this Court be made, requiring the said Edith McCoon and Carolyn F. McCoon and said Alice M. McCoon, as guardian of the property of said Carolyn F. McCoon, to show cause why the prayer of your petitioner should not be granted; and that your petitioner have such further or other decree, order or relief in the premises as may be just and proper."

To this petition was annexed the consent of the Guaranty Trust Company to act as such trustee.

An order to show cause was issued, upon the filing of the



petition and consent, directing Edith McCoon, Carolyn F. McCoon and Alice M. McCoon, as the general guardian of the property of Carolyn F. McCoon, an infant, to show cause why the prayer of the petitioner should not be granted. Thereafter, by order of the Supreme Court, William Greenthal was appointed special guardian for Carolyn F. McCoon in the proceeding, on the petition of her mother, showing that the daughter was then over seventeen years of age. The special guardian duly qualified. Edith McCoon and Alice M. McCoon, as general guardian of the property of Carolyn F. McCoon, filed answers to the petition subscribed by their attorney and verified by them, admitting all the allegations therein contained, joining in the prayer of the petition and asking specifically for the appointment of the Guaranty Trust Company as trustee of the trusts created for the benefit of Caroline McCoon Gunther by the last will and testament of Cornelius McCoon, deceased. The answer of the special guardian was the usual answer interposed for an infant, submitting the rights and interests to the protection of the court. The special guardian also filed his report with the court wherein he stated that he had examined all the papers in the proceeding, including the consent of the Guaranty Trust Company, and found them correct. All these papers were recited in a proposed order, submitted to the court by the attorneys for the petitioner, and containing the name of the Guaranty Trust Company as trustee. The entry of the order was consented to in writing, at the foot thereof, by the attorney for Edith McCoon and Alice M. McCoon, as guardian of Carolyn F. McCoon. The learned court, however, without any notice to the attorneys of any objection to the order proposed, struck out the name of the Guaranty Trust Company wherever it appeared in the order and inserted the name of Robert Lee Morrell, as trustee, and required him to file a bond for the faithful performance of his trust with sufficient sureties in the sum of \$20,000. The order so made was dated November 1, 1920.

Thereupon, attorneys for the petitioners, the special guardian and the attorneys for Alice M. McCoon, as general guardian of Carolyn F. McCoon, and Edith McCoon, moved "for leave to renew the motion heretofore made in the above entitled proceeding for the appointment of the Guaranty

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Trust Company of New York, as successor trustee of and under the last Will and Testament of Cornelius McCoon, deceased; for a re-argument and re-hearing of the said motion; for the vacation, cancellation, setting aside and re-settlement of the order dated November 1, 1920, appointing Robert Lee Morrell, Esq., to execute said trusts, and generally for the relief prayed for in the petition herein, and in the annexed affidavits, and for such other and further relief in the premises as to the Court may seem proper."

In support of this application the petitioner made affidavit that "deponent desired the appointment of a Trust Company in preference to an individual for many reasons. That during the enjoyment of the trust estate herein by deponent as its sole life beneficiary, there have been several substitutions or appointments of trustees made necessary by reason of their death during the administration of the trust estate, and that deponent desired to avoid the trouble, annoyance and expense of any further unnecessary proceedings in the administration of this estate, and desires to be relieved from further anxiety in this matter. Without intending in any way to reflect upon Mr. Robert Lee Morrell, whom the Court has named, deponent alleges that if any individual were made successor trustee herein, she would feel it incumbent upon her to maintain vigilance with regard to the general management and administration of the trust estate.

"That deponent, because of the nature of the trust, and its purpose of creation, feels she should not be subjected to the trouble, annoyance and responsibilities of business, and believes that all such questions would be avoided by the appointment of the Guaranty Trust Company of New York.

"That the Guaranty Trust Company of New York is the largest and one of the most financially responsible trust companies in the world and has a well established reputation for skill and efficiency in the management of trust estates, and has a trained force able to administer such estates, with celerity, good business judgment and at a minimum of cost.

"That deponent is not acquainted with Robert Lee Morrell, Esq., the person designated by his Court in the place of

deponent's choice or selection, to wit: the Guaranty Trust Company of New York, and your deponent opposes his appointment, and hereby renews her request for the appointment of the Guaranty Trust Company of New York."

Mrs. Alice M. McCoon, mother of the remaindermen, Edith McCoon and Carolyn F. McCoon, made a supporting affidavit, which set forth that on the appointment of Frederick W. Gunther, husband of the petitioner, as trustee, he was required to give a bond in the sum of \$250,000. She further set forth:

"That the said Carolyn Frances McCoon, although an infant, is of the age of seventeen years and upwards and will be eighteen years of age on the 25th day of January next; that she is a young woman of good education and good understanding and is and has been for several years past familiar with all of her financial affairs and with the details and affairs of the trust herein. That the appointment of the Guaranty Trust Company of New York was sought by said infant through deponent as her general guardian, with the full personal knowledge, consent and approval of said infant and also such nomination was, so far as is permissible by law, approved of and consented to by the guardian *ad litem* of said infant.

"That it was the unanimous wish of all the parties hereto, and they all agreed and now agree to the appointment of the Guaranty Trust Company of New York as such successor trustee. That upon the hearing heretofore had herein, no challenge was made as to the fitness, experience, skill and efficiency of said Guaranty Trust Company of New York to qualify and act and properly administer the unexecuted trust herein.

"That the reasons why the petitioner, Caroline McCoon Gunther, the life beneficiary of said trust, has instituted this proceeding for the appointment of the Guaranty Trust Company of New York as successor trustee, and why deponent as such general guardian, and said infant, Carolyn Frances McCoon, and the respondent, Edith McCoon, have desired its appointment as such successor trustee are as follows:

"The Guaranty Trust Company of New York is duly authorized under the laws of the State of New York to act

as a testamentary trustee and as a successor trustee herein. It is the largest trust company in the world and is trustee of numberless estates of large size and importance, and has a well established reputation for skill and efficiency in the management of such estates and a trained force able to administer such trusts with celerity, good business judgment and at a minimum of cost.

"That by reason of the death or resignation of the four prior individual trustees, the trust estate herein has already been put to great expense and risk, and the life beneficiary and remaindermen have been greatly inconvenienced and their interests therein jeopardized. The appointment of The Guaranty Trust Company of New York was accordingly sought in part by the parties hereto in order that they might be assured that all necessity for any further substitution of a trustee would be avoided.

"Moreover for over fifteen years your deponent has maintained a bank account with such Trust Company and that each of her daughters has also an account with the same, and that she and her daughters have had many and satisfactory business transactions with said Company, and that for over fifteen years past she has continuously consulted with said Company in respect to investments; that she and her said daughters are personally acquainted with the officers and agents who would have immediate charge of the management of such trust estate.

"That each and all of the persons interested herein oppose the appointment of Robert Lee Morrell, Esq., as such substituted trustee. Mr. Morrell is a stranger to each and all of the parties hereto and he has no knowledge or familiarity with the trust herein, its condition or its prior history, or the wishes, conditions and circumstances of the parties interested herein.

"All of the parties interested in the trust have known and are on intimate relations with the Guaranty Trust Company of New York or approve generally of its selection. That said Company, as aforesaid, is the largest and one of the most financially responsible trust companies in the world.

"That your deponent believes that it would be for the best interests of the trust estate and the persons interested

therein that the relations existing between such persons and the trustee should be harmonious.

"That deponent believes that the appointment of the Guaranty Trust Company of New York would promote the execution of the trust and would tend to promote harmonious relations among all the parties interested.

"That your deponent further states that she believes that the appointment of the Guaranty Trust Company of New York would generally facilitate the execution of said trust and would avoid the disadvantages arising through the appointment of an individual with the uncertainty of his term of life, and with the additional expense necessarily attendant thereon."

She also set forth:

"That deponent verily believes that the matter herein was submitted to the Court in an informal way and that all of the facts hereinbefore set forth were not at that time, fully brought to the attention of the Court, and that the reasons for and the propriety of the appointment of the said Guaranty Trust Company of New York were not fully set forth in the papers before the Court and that they were not fully explained by affidavit or otherwise."

Edith McCoon, the adult remainderman, submitted an affidavit stating that all the statements contained in the affidavit of her mother were true, and that she desired the appointment of a trust company in preference to an individual as trustee, believing it would best serve the interests of the trust estate, in which several substitutions of trustees had already been necessitated by death. She also set forth that she was acquainted with the officers of the Guaranty Trust Company wherein she had a bank account, and in whom she had full confidence. She concluded by saying: "That deponent is not acquainted with Robert Lee Morrell, the person designated by this court, and opposes such appointment. That deponent has substantial rights in this proceeding and believes that her interest herein would be best served and protected by the appointment of The Guaranty Trust Company as successor trustee."

Carolyn F. McCoon, the infant remainderman, made affidavit that she would become eighteen years of age within

two months; that she was familiar with the nature of the proceeding and the purpose of its institution, and that she sought the appointment of the Guaranty Trust Company as successor trustee and opposed the appointment of Mr. Morrell, respectfully requesting the court to appoint the trust company.

The learned court, despite this application of all the parties interested in the estate, denied the motion.

At the outset it should be said that there is not the slightest reflection made by any of the appellants upon the character, the ability or the rectitude of Mr. Morrell. He did not seek the appointment as trustee herein, and his sole concern in defending the appeal is his feeling that it is his duty to sustain the order because of the confidence reposed in him by the learned justice who appointed him. The objections are not urged against him personally. They would apply with equal force to any individual trustee and are based on the desire of all the persons interested in the trust estate to avoid a repetition of the expense, annoyance and care to which they have been subjected by the unusually checkered history of this trust estate in its thirty-seven years of existence. Not only do they seek the stability and freedom from natural death of a corporate trustee but they have special reasons for desiring the appointment of the Guaranty Trust Company with which they have sustained continuing relations of trust and confidence. Moreover, they do not desire to be put to the expense of premiums on bonds and of successive accountings whenever a new individual trustee might be required. It seems to me that in view of the record of the happenings in this estate, the desire of the life tenant and the remaindermen to have a corporate trustee, removed from the vicissitudes of individual life, is quite reasonable and proper.

Of course, the responsibility for the appointment of a trustee herein rests with the Supreme Court. Section 20 of the Personal Property Law (as amd. by Laws of 1911, chap. 217) provides that "On the death of a last surviving or sole surviving trustee of an express trust, the trust estate does not pass to his next of kin or personal representative, but, if the trust be unexecuted, in the absence of a contrary direction on the part of the person creating the same, it vests in the Supreme Court and shall be executed by some

person appointed by the court, whom the court may invest with all or any of the powers and duties of the original trustee or trustees. The beneficiary or beneficiaries of the trust shall have such notice as the court may direct of the application for the appointment of such person; and the person so appointed shall give such security as the court may require, and shall be subject to the same requirements of law as to accounting and as to the administration of the trust as apply to testamentary trustees; and shall be entitled to such compensation for his services by way of commissions as may be fixed by any court which has power to pass upon his final account, which shall in no case exceed that now allowed by law to executors and administrators, besides his just and reasonable expenses in the matter in which he is appointed." As to real property a similar provision is made by section 111 of the Real Property Law (as amd. by Laws of 1911, chap. 216).

The learned respondent has called attention to the fact that the order is improper in form in that it purports to appoint a sole trustee of the trusts in question as successor to and in place and stead of the deceased sole trustee, and to vest him "with all the estate given and bequeathed by said will of Cornelius McCoon, deceased, in trust for Caroline McCoon Gunther, and with all the rights, powers, duties, privileges and benefits belonging or incidental to said trust, and as expressed and contained in said will, as if the said Robert Lee Morrell had been originally named in said will as executor thereof and as sole trustee of said trusts created for the benefit of said Caroline McCoon Gunther;" whereas under the statute, in case of the death of a sole surviving trustee, the court has no power to appoint a successor trustee, but the trust vests in the Supreme Court and shall be executed by some person appointed by the court who is invested by it with any or all of the powers and duties of the original trustee, but with the trust still remaining vested in the court. In this the respondent is quite correct and the court does not appoint a new trustee in this particular contingency, but simply an agent of the court to carry out the unexecuted trust. (*Willey v. Robinson*, 85 Hun, 362; *Wetmore v. Wetmore*, 44 App. Div. 52; *Jewett v. Schmidt*, 83 id. 276; *Matter of Gueutal*, 97 id.

530.) The form of the order, however, is a mere irregularity, which could be modified to express the statutory character of the power conferred.

But while the power is resident in the court alone to appoint an agent to carry out the unexecuted trust, and while the parties in interest cannot upon consent oust the court of its power of selection by compelling it to appoint any one upon whom they may agree, the discretion of the court in appointing an agent should be exercised with due regard to the reasonable wishes of those entitled to the income and ultimate ownership of the principal of the trust fund. While they cannot impose their will upon the court, the court should not be entirely heedless of their desires in relation to the administration of the estate. The responsibility for the preservation of the estate is on the court, but that responsibility can be adequately discharged without doing violence to the unanimous wish of the parties interested as to the kind of an agent to be appointed, even if it does not yield to their selection of a particular agent. In this proceeding the reason assigned for asking the court to select a corporate agent seems to be sufficient to warrant the granting of the request. Upon the motion for a reargument herein the reasons were set forth at length why a trust company was desired to be appointed, and the suggestions made in *Powers v. Powers* (189 App. Div. 112) were all complied with, so that the objections which led to the conclusion of the court in that case were obviated here. The power of the appointment vested in the court to appoint trustees, while largely discretionary, is not to be exercised arbitrarily, but with due consideration of the wishes of those chiefly interested, except where there is some question of fitness of the suggested appointee, or where the beneficiaries fail to agree. (*Quackenboss v. Southwick*, 41 N. Y. 117; *Matter of Morgan*, 63 Barb. 621; *affd.*, 66 N. Y. 618.)

While perhaps the original application did not sufficiently advise the court that a corporate trustee was desired and the reasons therefor, the affidavits submitted on the motion for reargument did fully set forth all the consideration which moved the parties in interest unanimously to ask for such a trustee, and in the exercise of sound discretion a corporate agent to carry out the unexecuted trust should have been



appointed by the court, though not necessarily the trust company suggested, if the court deemed it unsuitable and saw fit to name another which it thought would more properly administer the trust.

An important consideration for the selection of a corporate agent is the saving to the trust estate of the expense of the annual premium for the bond which an individual agent would be required to give. The amount of \$20,000 fixed by the court was entirely inadequate for a trust estate amounting to \$213,000 with an annual income amounting to \$10,130. When the petitioner's husband was appointed substituted trustee of this trust, he was required to furnish a bond in the sum of \$250,000. There is no reason why a stranger to the trust should not have been required to furnish a bond in at least the same sum, if not double the amount involved, and the annual expense for premiums on the bond, chargeable against the trust estate, would have very materially reduced the net income to the life tenant.

The orders appealed from will, therefore, be reversed, with ten dollars costs and disbursements to all parties separately appearing upon the appeal and filing briefs herein payable out of the trust estate; and the proceeding will be remitted to Special Term for the appointment of a suitable trust company as agent to administer the unexecuted trust pursuant to the provisions of section 20 of the Personal Property Law.

CLARKE, P. J., LAUGHLIN, MERRELL and GREENBAUM, JJ.,  
concur.

Orders reversed, with ten dollars costs and disbursements to all parties separately appearing and filing briefs payable out of the estate, and proceeding remitted to Special Term for further action in accordance with opinion.

In the Matter of PETER C. KELLY, an Attorney.

First Department, May 27, 1921.

**Attorney and client — attorney suspended for one year for procuring excessive fees by false representations and for paying client sum of money to induce him to withdraw charges — obtaining fee, retention of which is contingent upon success — purpose of disciplinary proceedings — payment pending such proceedings does not condone offense.**

Attorney at law suspended from practice for one year for securing an excessive fee from his client by means of false representations and for paying said client a sum of money to induce him to sign a paper withdrawing all claims and charges while an investigation was being made by the grievance committee.

It is misconduct for an attorney to obtain a fee, the retention of which is contingent upon success.

Disciplinary proceedings are not instituted for the purpose of recovering money claimed to be due to a client from an attorney and payment pending such proceedings does not condone the offense.

The purpose of such an investigation is to inquire into the character and conduct of the attorney to see whether or not it comports with the standard required of an honorable profession.

DISCIPLINARY proceedings instituted by the Association of the Bar of the City of New York.

*Einar Chrystie*, for the petitioner.

Respondent in person.

CLARKE, P. J.:

The respondent was admitted to practice as an attorney and counselor at law at a term of the Appellate Division, First Department, in February, 1903, and has since practiced in said department.

The petition charges the respondent with misconduct as an attorney at law in securing an excessive fee from his client upon false representations and with having, while the charges were under investigation by the grievance committee, paid said client a sum of money to induce him to sign a paper withdrawing all claims and charges made against the respondent. The specifications of the charge are as follows:

In July, 1918, Matthew Talmo (the son of Thomas Talmo) was arrested in the borough of The Bronx on the charge of assaulting a young woman with whom he was living and who was the mother of his infant child. Thomas Talmo, the father of Matthew Talmo, thereafter retained the respondent to look after his son's interests and paid him seventy-five dollars in full for his services to be rendered in the Magistrate's Court. Matthew Talmo was arraigned on July 26, 1918, in the Magistrate's Court, borough of The Bronx, and upon the request of the respondent, who then appeared as his attorney, the case was adjourned until July 29, 1918. On July 29, 1918, Talmo was again arraigned in the same court and the respondent, acting as his attorney, entered a plea of guilty in his behalf. It was then established that the prisoner had committed a particularly brutal assault upon the woman and the magistrate sentenced him to serve a term of six months on Blackwell's Island.

On July 31, 1918, the respondent obtained the further sum of \$300 from Thomas Talmo upon the representation that he could secure his son's release from Blackwell's Island within five days and that he would return the said sum if he failed to procure the boy's release. Thomas Talmo cannot read the English language. The respondent gave him a receipt of which the following is a copy:

"NEW YORK, *July 31st*, 1918.

"This agreement made this day between Peter C. Kelly party of the first part and Thomas Talmo,

"*Witnesseth*, that the party of the first part does hereby agree to take on appeal the case of the People v. Mathew Talmo held in the City Magistrate's Court of the City of New York, on the 29th day of July, 1918, and to pay the disbursements incidental thereto and has received this day the sum of \$300.00 in consideration therefor.

"PETER C. KELLY."

The defendant having entered a plea of guilty, the only question which could be raised upon the appeal was whether or not the sentence imposed by the magistrate was excessive. The services rendered by the respondent upon the appeal consisted in arguing the appeal and in interviewing the magis-

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trate who had sentenced the defendant and writing one letter to him in which he requested permission to state to the appellate court that the magistrate had changed his mind and was now of the opinion that the defendant had been sufficiently punished and that the sentence should be modified accordingly. The respondent did not prepare or submit any memoranda or brief in support of his contention on appeal.

The charge of \$300 for the services rendered or which could be rendered by the respondent in the matter of the Talmo appeal was excessive and the representations made by the respondent to Thomas Talmo in order to induce him to pay the \$300 as aforesaid were false.

While the case was pending before the committee on grievances and after it had been adjourned upon respondent's request in order to give him the opportunity of producing certain additional witnesses in his behalf, the respondent arranged a settlement with Thomas Talmo and paid him the sum of \$200. He also prepared and induced Talmo to sign a statement in writing of which the following is a copy:

"Received this day from Peter C. Kelly the sum of Two hundred dollars in full and satisfaction and accord re People vs. Matthew Talmo. In view of the fact that there has existed a difference of opinion between Thomas Talmo and Peter C. Kelly in reference to the above, and after frequent conversations had with the said Peter C. Kelly, does for the purpose of avoiding further annoyance herein and in order to buy peace this day pay to me the sum of Two hundred dollars (\$200.). The appeal herein at the argument of which I was personal present on which the findings of the lower court were sustained was a disappointment. I hereby agree all claims had by me against Peter C. Kelly are fully liquidated and that further no misrepresentations have been made to me regarding the appeal herein and that I have not been deceived thereby.

"I further desire to state that I do not intend to further proceed with the matter now pending, and hereby withdraw all claims made and charges pending against the said Peter C. Kelly.

"TOM TALMO"

The learned official referee has found among other things as follows:

"At the time that respondent charged and received the \$300 from Thomas Talmo for taking the appeal, he knew that the defendant, having pleaded guilty, had no grounds in law or in fact on which to base his appeal.

"The respondent did not make clear to or sufficiently inform Thomas Talmo of the nature or scope of the appeal or the limits of the possible or probable results thereof.

"In view of the station in life of Thomas Talmo, of his limited knowledge of the English language, of his dependence upon the respondent as his legal adviser and of the respondent's knowledge that he had no legal ground for appeal, the sum of \$300 was an excessive charge."

From a thorough examination of the testimony and exhibits we are satisfied that as an inducement for the payment of the \$300 the respondent represented and agreed to secure a modification of the sentence and the release of the complainant's son from imprisonment within a few days and that if he did not succeed he would return the \$300 asked for and received as a fee for such services to be rendered. He did not succeed and refused to pay back the said sum or any part thereof after repeated demands until after proceedings had been instituted before the grievance committee of the Bar Association and hearings had been had, when he settled with his client by the payment of \$200, as he himself said, for the purpose of buying his peace and taking from him a receipt which expressly recited that it was "for the purpose of avoiding further annoyance herein and in order to buy peace." And he also included in said receipt which he procured the complainant to sign: "I hereby agree all claims had by me against Peter C. Kelly are fully liquidated and that further no misrepresentations have been made to me regarding the appeal herein and that I have not been deceived thereby.

"I further desire to state that I do not intend to further proceed with the matter now pending, and hereby withdraw all claims made and charges pending against the said Peter C. Kelly."

The payment of said money and the procuring of the complainant to sign such a receipt, while the investigation as to

his conduct was proceeding, was highly reprehensible. Notwithstanding the giving of said receipt the complainant under subpoena testified before the official referee clearly and distinctly as to the facts, including the promise and was unshaken upon cross-examination. On the other hand, the respondent's testimony was not convincing and his statements made upon the preliminary examination before the grievance committee were quite at variance with those before the referee, and his principal witness not only failed to support him but flatly contradicted him as to matters in regard to which the respondent had testified.

Assuming that no promise to return the fee paid in case of failure was made, we agree with the learned official referee that the charge was excessive for the work done. But we go further and are of the opinion that the record establishes misconduct in the particulars referred to, namely, the obtaining of a fee, the retention of which was contingent upon success, the material differences in testimony given before the grievance committee and at the hearing, the settlement during the pendency of the proceedings and the obtaining of the receipt confessedly given for the purpose of buying his peace and presented in exoneration of the charge made.

We have frequently said that disciplinary proceedings are not instituted for the purpose of recovering money claimed to be due to a client from an attorney and that payment pending such proceedings does not condone the offense. The purpose of such investigation is to inquire into the character and conduct of an attorney to see whether or not it comports with the standard required of an honorable profession. We are satisfied that the respondent's conduct in the matter complained of has fallen short, and that discipline must be administered. He is, therefore, suspended from practice for one year.

LAUGHLIN, DOWLING, SMITH and GREENBAUM, JJ., concur.

Respondent suspended for one year. Settle order on notice.

## In the Matter of BENJAMIN LEVINSON, an Attorney.

First Department, May 27, 1921.

**Attorney and client — suspension of attorney for six months for failure to render substantial service under contract of retainer and to repay clients amount agreed if unsuccessful — power of court to investigate contracts between attorneys and clients relating to professional services.**

Attorney at law suspended for six months where it appeared that after receiving payments under agreements to procure the reclassification of men subject to the United States Selective Service Law and to return the amounts received if unsuccessful, said attorney rendered no material service to his clients and failed to repay to them the amount agreed.

While attorneys at law are privileged to make contracts with their clients for remuneration for services, yet the court is vested with a supervisory control over its officers and is authorized to investigate dealings between those officers and their clients to see that the conduct of its officers is fair, honest and straightforward and that clients are neither deceived nor defrauded in their relations with their attorneys, and while the court does not summarily or by disciplinary proceedings investigate ordinary business contracts made by attorneys, yet when the basis of the contract is the professional relation of attorney and client, its jurisdiction is plenary and ample.

DISCIPLINARY proceedings instituted by the Association of the Bar of the City of New York.

*Edward J. McGuire* of counsel [*Einar Chrystie*, attorney], for the petitioner.

Respondent in person.

CLARKE, P. J.:

The respondent was admitted to the bar at a term of the Appellate Division, First Department, in June, 1899, and was practicing in the First Judicial District at the time he committed the acts complained of.

The petition alleges that he has been guilty of misconduct as an attorney at law with four specifications. The learned official referee has found him not guilty of the first specification. The second is as follows:

In October, 1918, the respondent received the sum of \$200

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for services to be rendered in behalf of Jacob Fleitman, who had been classified in class 1, pursuant to the provisions of the Selective Service Law. The money was paid to the respondent upon the express condition and agreement by respondent that if for any reason the respondent failed to secure Fleitman's reclassification into class 5 the respondent would return \$100 thereof. The respondent did not render any substantial service in behalf of his client. Fleitman was not reclassified but was inducted into the military service of the United States. The respondent has refused to return any part of the money paid to him as aforesaid.

The third charge states a similar agreement with one Cebarsky, and the fourth charge is as follows:

That in September, 1918, the respondent received the sum of seventy-five dollars for services to be rendered in behalf of one Nathan Cohen in connection with his registration and reclassification under the Selective Service Law. Cohen was inducted into the military service of the United States and sent to France. The respondent did not render any substantial service in behalf of his client. The respondent has refused to return any part of the money received by him as aforesaid.

As to charges 2 and 3 the respondent admits the agreement and receipt of payment and denies the rest. As to the fourth charge he admits the agreement and the receipt of seventy dollars, denying in his answer the remaining allegations.

The learned official referee has reported as to charge 2 that "it clearly appears from the evidence that the respondent in the referee's opinion rendered no substantial service to Fleitman for the \$200 fee he received nor did he ever refund the \$100 as required by the explicit terms of the agreement embodied in the receipt. Respondent claims that he tendered this amount to Fleitman but Fleitman refused to accept it. I find upon the second charge that the respondent was guilty of unprofessional conduct in that he did not to any appreciable degree carry out the conditions with his client."

As to the third charge he reports: "It is clear from a thorough examination of the testimony, that the complaining witness's discharge from the army was due to no service rendered for him by respondent. It is also undisputed that no part of the fee was ever refunded by respondent as required



by his agreement of retainer. Therefore, upon charge No. 3, concerning Julius Cebarsky I find the respondent guilty of misconduct as an attorney at law."

As to charge 4 he reports: "It appears from the respondent's direct testimony that the original agreement of \$200 was abandoned by him voluntarily, and that he agreed to refund \$37.50. The evidence is undisputed that no part of the fee was ever refunded by respondent, and upon charge 4, I find the respondent guilty of misconduct in that he did not make the refund called for by his agreement."

The United States Selective Service Law of May 18, 1917, provided that all males between the ages of twenty-one and thirty were required to be registered and thereafter made subject to draft according to its terms in the military forces authorized by the act unless either exempted or excused. (40 U. S. Stat. at Large, 80, § 5.)\* Section 79 of the regulations adopted pursuant to said act provided that any registrant who was found to be a resident alien (and not an alien enemy) and who had not declared his intention to become a citizen of the United States should be placed in class 5 of the registrants unless he waived expressly his exemption. In class 5 were placed those who were permanently incapacitated and those wholly unfit and incapable of military service.

There was a simple question of fact presented in each case before the local board which was whether the registrant was a non-declarant alien and, therefore, entitled to be placed in class 5 as wholly exempted from military service.

The respondent alleges that he had been for a number of years attorney for the Immigrant Aid Society and that in the course of his work he had been brought in contact with hundreds if not thousands of immigrants and aliens and that they came to him with their grievances at the time of this confusion in the administration of the Selective Service Law as regards aliens; that he found in many instances that the local boards had placed non-declarant aliens in class 1, as subject to military duty who ought not to have been so classified; that he deemed it the legal right of these persons to have a review of the action of the local boards by the courts, and

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\* Since amd. by 40 U. S. Stat. at Large, 955, § 3.—[RER.]

that in the case entitled *United States ex rel. Samuel Miller v. Local Exemption Board No. 8 of the City of New York* he had succeeded in obtaining from one of the judges of the United States District Court in the southern district of New York the allowance of a writ of certiorari to review the action of the local board and as a result thereof his client had been released from the obligation of service; that this becoming known a number of other non-declarant aliens had come to him for aid and assistance in their attempts to avoid military service and that he had begun some twenty-two other certiorari proceedings but that none of the other United States judges would follow the precedent established in the *Miller* case and refused the writ; that he felt that as these were test cases and that if he succeeded the result would be for the benefit of all of the people who came to him he was entitled to charge each one a proportionate fee of \$200 to pay for his general services in the matter, making an agreement to refund one-half of the amount if the registrant was not discharged from service for any cause. He claims to have paid back one-half the amount received from all of his clients with the exception of the three named in the second, third and fourth specifications of the charges in the petition. He further claims that at the utmost all that has been shown is a breach of contract in that he has not paid back the amount agreed upon and for such breach of contract an action might lie but that he would not be amenable therefor to disciplinary proceedings. The respondent loses sight of the fact, however, that while attorneys at law are privileged to make contracts with their clients for remuneration for services yet the court is vested with a supervisory control over its officers and is authorized to investigate dealings between those officers and their clients to see that the conduct of its officers is fair, honest and straightforward and that their clients are neither deceived nor defrauded in their relations with their attorneys, and while the court does not summarily or by disciplinary proceedings investigate ordinary business contracts made by attorneys, yet when the basis of the contract is the professional relation of attorney and client its jurisdiction is plenary and ample. We do not pass upon the question of the legality of the contracts of retainer as

no such issue was presented in the petition. The sole question is whether the respondent earned the full amount paid to him by his efforts, that is, did he obtain the release of the specified individuals from military service, as to which the answer must be, under this evidence, that he did not. *Secondly*, whether he has repaid to them the amount agreed by him to be repaid upon his failure to accomplish said result, it is established that he did not. *Thirdly*, whether the facts established that he was guilty of professional misconduct in not so repaying them the amount agreed upon, the answer must be that he was. An enormous amount of irrelevant testimony was taken in the case. The brief submitted by the respondent consists of upwards of 200 typewritten pages, the greater portion of which is utterly irrelevant to the issues. The ultimate fact is that he did nothing for the particular persons mentioned in the three charges sustained by the referee and that he has not repaid the amount that he agreed to.

Our conclusion is that he should be suspended for six months.

LAUGHLIN, DOWLING, MERRELL and GREENBAUM, JJ.,  
concur.

Respondent suspended for six months. Settle order on notice.

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In the Matter of MARTIN O'BRIAN, an Attorney.

First Department, May 27, 1921.

**Attorney and client — attorney suspended from practice for one year for omitting to inform clients of collections and converting same to his own use — age and previous good character of attorney considered.**

An attorney at law, guilty of misconduct in failing to inform his clients of the amounts collected for them and in converting part of said amounts to his own use, is sufficiently punished by suspending him from practice for one year, where it appears that he is seventy years of age and has been long at the bar without previous charges having been made against him.

DISCIPLINARY proceedings instituted by the Association of the Bar of the City of New York.

*Einar Chrystie*, for the petitioner.

*John T. Easton*, for the respondent.

CLARKE, P. J. The respondent was admitted to the bar at a General Term of the Supreme Court, Third Department, in 1879, and has ever since been practicing as an attorney and counselor at law in this State. He was charged with misconduct as an attorney; in brief, as follows:

(a) While acting as attorney for Ellen Anderson he collected \$500 from the Travelers Insurance Company in settlement of her claim for damages for injuries suffered by her in an automobile accident. He thereafter represented to Carl Anderson, also his client, that he had settled such claim for \$350, and converted the balance thereof to his own use.

(b) That being the attorney for said Carl Anderson he collected a judgment in favor of the latter against the Globe Tire Company for \$378 and concealed from his client the fact that he had so collected the judgment and converted the amount thereof to his own use.

The facts reported by the learned official referee and sustained by the evidence are that Mr. and Mrs. Anderson in an automobile owned by the former had a collision with a truck of the Globe Tire Company somewhere in New Jersey prior to November, 1919. Mrs. Anderson was physically injured, her husband's automobile was damaged. The Globe Tire Company apparently carried insurance in the Travelers Insurance Company. Anderson retained the respondent, whom he had not previously known, to prosecute his own and his wife's claim on a contingent fee of thirty-three and one-third per cent of the amount collected. Respondent brought action for both of them. On or about February 24, 1920, the respondent settled the case of Mrs. Anderson with the insurance company for \$500 and received in payment its check to his order for that amount. A few days thereafter respondent notified Anderson that he had settled the matter and the latter came to his office where it is admitted that he received from the respondent \$233 in cash on behalf of his

wife. Anderson testified that respondent told him he had collected \$350 from the insurance company and did not tell him that he had in fact collected \$500. The respondent on the contrary testified that he informed Anderson that the amount collected was \$500, that he paid him on the last-mentioned date \$233, and then and there stated to him that he was short of funds, and that Anderson consented to loan him \$100 of the money then collected. Anderson denies any such transaction. Respondent did not give to Anderson or his wife any note, receipt or other evidence of this alleged loan and the learned referee finds that no such transaction took place.

Thereafter a judgment was obtained in Anderson's action for damages to his automobile for \$378, and on May 10, 1920, respondent received a check for that amount in payment thereof, which check he cashed, concealed the fact of his collection of the amount of the judgment from his client and converted the same to his own use. Thereafter Anderson discovered that the judgment in his favor for \$378 had been satisfied and then went to the Travelers Insurance Company and learned that his wife's case had been settled for \$500, and he testified that he went to the respondent who said: "Certainly I got the money but I was short and I used it," and gave Anderson his note for \$208 payable in fifteen days. He subsequently sent to Mrs. Anderson two payments, one of \$10 and one of \$25. The balance of the amount due on said note is still unpaid.

There was some conflict in the evidence, respondent claiming that he had informed the Andersons that the settlement had been made for \$500 and that he had collected the amount and that \$100 thereof had been loaned to him. The learned referee who had the benefit of seeing and listening to the witnesses has resolved the question of fact involved against the respondent and has found: "It is my opinion that the respondent has been guilty of unprofessional conduct in that he omitted to inform his clients of the amounts collected for them and in converting part of the same and I find that the charges are sustained to the extent indicated."

A careful examination of the testimony adduced upon the hearing satisfies us that the conclusion of the referee is sus-

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First Department, May, 1921.

tained by the evidence and we approve the same. It is elementary that an attorney has no right to conceal the facts of his collection of moneys due to his clients and has no right to retain any part thereof, beyond his agreed-upon compensation for his services. It is clear that the respondent deceived his clients and converted their money. His attempted defense and excuse of a loan to him of a portion thereof, not evidenced by any writing, receipt, note or memorandum, was not believed by the referee who has found the client's statement of the facts sufficiently corroborated and so it appears to us.

The respondent is seventy years of age and has been long at the bar without previous charges having been made against him. Taking these matters into consideration we think justice will be done by suspending respondent for a year.

LAUGHLIN, DOWLING, MERRELL and GREENBAUM, JJ.,  
concur.

Respondent suspended for one year. Settle order on notice.

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GEORGE HADJOPOULOS, Appellant, v. EVANGELOS LUCA  
MANOUSSO, Respondent. (No. 1.)

First Department, May 27, 1921.

**Costs — amendment of answer upon payment of taxable costs to date — ultimate recovery by plaintiff — amount of taxable costs paid on amendment not to be deducted — motion costs paid on amendment may be deducted.**

Taxable costs including term fees, order for publication and costs for examination before trial, which the defendant was required to pay as a condition to amending his answer, may be taxed again as costs against the defendant on recovery of final judgment by the plaintiff.

The amount fixed to be paid by the defendant as a condition to granting leave to serve an amended answer was intended to reimburse the plaintiff in a measure for expense incurred in preparation which the amendment had rendered futile and in no manner affected the right of the successful party to statutory costs on final judgment.

However, the plaintiff was not entitled to tax as costs on the final judgment motion costs which the defendant paid as a condition for leave to serve

his amended answer since at that time they were not within the category of taxable costs, and having been included in the amount and paid they could not be taxed when final judgment was entered, and they were properly eliminated from the bill of costs as taxed.

APPEAL by the plaintiff, George Hadjopoulos, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of March, 1921, granting defendant's motion to retax costs and directing that costs heretofore taxed be modified.

*Robert Moers* [*Robert I. Rogin* with him on the brief], for the appellant.

*John F. O'Neil* of counsel [*J. Carl Becher*, attorney], for the respondent.

PAGE, J.:

An order was granted permitting the defendant to serve an amended answer upon payment of taxable costs to date. Costs were taxed at one hundred and twenty dollars, which the defendant paid. The items so taxed and paid were costs before notice of trial, after notice of trial, two motions, order for publication, examination of three parties before trial and three term fees. The action was tried and resulted in a judgment for the plaintiff. A bill of costs was taxed consisting of the above items, and in addition the following: Trial fee, trial occupying more than two days, attachment allowance, four term fees and disbursements amounting in the aggregate to two hundred and ninety-one dollars and forty-four cents. An order was entered upon defendant's motion retaxing the costs by striking from the bill the following items: Three term fees, thirty dollars; order of publication, ten dollars; costs of two motions, twenty dollars; costs of examination before trial of three parties, thirty dollars. The reason given by the court at Special Term was that as these costs had been paid, the plaintiff was only entitled to costs before and after notice of trial, and the costs of subsequent proceedings, and he relied upon the case of *Grant v. Pratt & Lambert* (110 App. Div. 149) the head note of which he quoted. The head note is misleading. The opinion states that "the plaintiff was

not entitled to again tax the disbursements that had been incurred prior to the amendment and which as a condition for allowing the amendment had been actually paid by the defendant."

The other question considered by the court was the right to tax costs of an appeal which had been determined prior to the amendment and paid by the defendant; and the court held that they could not again be taxed, and limited the taxation to the costs before and after notice of trial and all costs subsequent to the amendment, treating those costs as though there were a new action. Any doubt upon this question which may have arisen from prior conflicting opinions was resolved in the case of *National Surety Company v. Seach* (183 App. Div. 110) in which this court held that when the court at Special Term permitted the service of a second amended complaint "upon payment of 'a full bill of costs to date' it merely adopted a convenient form of measuring and fixing a sum of money which should be paid by the plaintiff, instead of specifying the sum, as might have been done.

\* \* \* The court was not awarding the defendant statutory costs as such, but was merely imposing as terms the payment of a sum measured by the amount of taxable costs." We held that costs taxed and paid upon the leave given to serve the first amended complaint should again be taxed and paid as a condition for the second amendment.

The amount fixed to be paid by the defendant as a condition for leave to serve an amended answer was intended to reimburse the plaintiff in a measure for expense incurred in preparation which the amendment had rendered futile, and in no manner affected the right to statutory costs on final judgment to the successful party. Therefore, the plaintiff was entitled to tax again the items of the three term fees, order of publication and costs for examination before trial. (See Code Civ. Proc. § 3251.)

A different question arises as to the costs of the two motions. Section 779 of the Code of Civil Procedure provides how motion costs shall be collected and they are not taxable unless they have not been paid at the time when the final judgment is entered. They were not, therefore, within the category of taxable costs when the answer was



amended. But having been included in the amount and paid, they could not be taxed when final judgment was entered, and were properly eliminated from the bill of costs as taxed.

The order will, therefore, be modified by striking therefrom the following item: "3 Term fees, amount to \$30.00, Order of Publication \$10.00, \* \* \* Cost of examination before trial of three parties \$30.00," and as modified affirmed, with ten dollars costs and disbursements to the appellant.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ.,  
concur.

Order modified as directed in opinion and as so modified affirmed, with ten dollars costs and disbursements to appellant.

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GEORGE HADJOPOULOS, Respondent, v. EVANGELOS LUCA  
MANOUSSO, Appellant. (No. 2.)

First Department, May 27, 1921.

**Attachment — discharge after final judgment — undertaking  
required.**

Since the amendment of sections 687 and 688 of the Code of Civil Procedure, by chapter 507 of the Laws of 1906, the defendant, in order to secure the discharge of an attachment after final judgment, must file the same undertaking as where application is made before final judgment, and in addition thereto he must give the security required to perfect an appeal to the Court of Appeals from a final judgment, of the same amount or to the same effect, and to stay the execution thereof.

APPEAL by the defendant, Evangelos Luca Manoussou, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of April, 1921, granting plaintiff's motion for a reargument and denying defendant's motion for an order to discharge the warrant of attachment after judgment.

*Tobias A. Keppler* of counsel [*J. Carl Becher*, attorney],  
for the appellant.

*Robert Moers*, for the respondent.

PAGE, J.:

The plaintiff, in an action wherein he demanded judgment for the sum of \$68,000, obtained a warrant of attachment which was levied on certain stock of the defendant in certain corporations which the defendant claims to be of the value of \$100,000. The action was tried and resulted in a judgment for the plaintiff in the sum of \$16,260.43. The defendant has appealed from this judgment and filed an undertaking by a surety company which provides that if the appeal is dismissed or the judgment affirmed the surety company will pay to the plaintiff the amount of the judgment and any damages sustained by him not to exceed \$500. Thereupon the defendant made a motion to discharge the attachment, relying upon the final sentence of section 688 of the Code of Civil Procedure. The motion was at first granted, but on reargument was denied by the justice at Special Term.

Prior to 1906 section 687 of the Code of Civil Procedure provided that "The defendant may, at any time after he has appeared in the action, and before final judgment, apply to the judge who granted the warrant, or to the court for an order to discharge the attachment, as to the whole or a part of the property attached;" and section 688 ended with the sentence of which the concluding words are "appraised value of that portion." (Laws of 1876, chap. 448, § 687; *Id.* § 688, as amd. by Laws of 1877, chap. 416, § 1, subd. 149.) Section 1311 of the Code of Civil Procedure provided that where the security given upon an appeal taken from a final judgment of the Supreme Court or certain lower courts is equal to that required to perfect an appeal to the Court of Appeals and to stay execution of the judgment the court may, in its discretion, make an order discharging a levy by execution upon personal property; but also expressly provided: "But this section does not authorize the discharge of a levy, made by virtue of a warrant of attachment." There was, therefore, no provision in the Code of Civil Procedure for the discharge of an attachment after final judgment. If the levy of the attachment was not discharged prior to judgment, the property levied upon by the attachment would be held subject thereto, although the undertaking was filed to perfect the appeal and stay the execution; and if the warrant was discharged before

judgment by giving an undertaking, the sureties were not relieved by the giving of the undertaking to perfect the appeal and stay execution.

In 1906 the Legislature amended section 687 by striking out the words "and before final judgment" (Laws of 1906, chap. 507), and section 688 by adding the words: "Upon such application being made after final judgment, the defendant must give the security required to perfect an appeal to the Court of Appeals from a final judgment, of the same amount or to the same effect, and to stay the execution thereof" (Laws of 1906, chap. 508). Section 1311 was not amended, except as it had been theretofore amended in a way not here material. (See Laws of 1895, chap. 946; Laws of 1899, chap. 215.) If we should adopt the theory of the appellant we would authorize the discharge of the levy of the attachment upon the filing of the undertaking in the form and to the effect of that required to perfect an appeal to the Court of Appeals and stay the execution, which section 1311 says is not authorized. It is a well-settled rule of statutory construction that all parts of a statute must be read together and such construction given, if possible, as will render the different provisions harmonious and effective.

After the amendments of 1906 an application to discharge an attachment could be made at any time after the defendant appeared before or after final judgment. Section 688 states that "upon such an application," *i. e.*, upon an application made at any time after the defendant had appeared, the defendant must give an undertaking to pay to the plaintiff the amount of any judgment which may be recovered in the action. If the application is made after judgment there is an additional, and not a substitutional requirement that the defendant must also give the undertaking to perfect the appeal and stay the execution. Any other construction leads to this absurdity, that if the application is made before judgment, and the undertaking given, the sureties remain liable, even if the judgment be in favor of the defendant and be reversed on appeal and a new trial granted, and must pay any judgment which is finally recovered in the action (*Youngman v. Fidelity & Deposit Co.*, 87 Misc. Rep. 456); whereas, if the application is made after judgment in favor of the plain-

tiff, the attachment could be discharged by merely filing an undertaking to pay if the judgment is affirmed or the appeal dismissed, and should the judgment be reversed and a new trial granted and a second judgment recovered for the plaintiff, the property attached would have been released and nothing would stand as security therefor. It would be unreasonable to suppose that the Legislature intended that a creditor whose claim had been reduced to judgment should have less security than one whose claim was only asserted in an action.

The order should, therefore, be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ., concur.

Order affirmed, with ten dollars costs and disbursements.

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JAMES P. DONNELLY, as Administrator, etc., of GEORGE F. DONNELLY, Deceased, Respondent, v. THOMAS B. YUILLE, Appellant.

First Department, May 27, 1921.

**Motor vehicles — action for death of child — owner not liable where accident occurred while chauffeur was using automobile for his own purposes — erroneous charge as to whether chauffeur engaged in master's business.**

The defendant, the owner of an automobile, was not liable for the death of plaintiff's intestate, a child between twelve and thirteen years of age, where it appeared that on the day of the accident the defendant's chauffeur, after driving the defendant from his place of business to his home, drove the automobile to the garage where he was informed that he was wanted at his home, and that he then proceeded from the garage to his own home and while turning the car around in the street on which he lived, he ran over the plaintiff's intestate, causing his death.

It was error for the court to so charge the jury that it might find that at the time of the accident the chauffeur was engaged in the business of the defendant, for there was nothing in the evidence that would warrant the inference that the use of the machine would in any way facilitate or expedite his master's service.

APPEAL by the defendant, Thomas B. Yuille, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Bronx on the 13th day of May, 1920, on the verdict of a jury for \$6,000, and also from an order entered in said clerk's office on the 19th day of May, 1920, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*Clarence S. Zipp* of counsel [*Benjamin C. Loder*, attorney], for the appellant.

*Arthur A. Henning*, for the respondent.

PAGE, J.:

This is a statutory action (Code Civ. Proc. § 1902 *et seq.*) brought by an administrator to recover damages for negligently causing the death of a boy between twelve and thirteen years of age. There is very little conflict in the evidence as to the facts in this case. Briefly stated, they are as follows:

The defendant was the owner of a Cadillac limousine automobile, and John J. Nash was in his employ as chauffeur. On the day in question the chauffeur drove the defendant from his place of business to his home at the corner of Fifty-fifth street and Park avenue, where they arrived at about six-thirty P. M. Nash then drove to the garage at Park avenue and Fifty-ninth street, where he was informed that there was a message on the bulletin board for him. He left the car on the floor of the garage and went into the office and read, "Nash, come home," or "Nash, you are wanted home." He then entered the car, backed out of the garage and proceeded to his home, which was at 443 East One Hundred and Thirty-fourth street in the borough of The Bronx, arriving there between seven-twenty and seven-thirty. There were boys, among whom was the plaintiff's intestate, playing games upon the sidewalk. As they were about to cross from the south to the north side of the street, Nash drove into the block. They waited for him to pass, but he turned his car around. The street being narrow, he had to back and start ahead, back again and start ahead. When he had done this, the boys, thinking he had come to a stationary position,

crossed over behind him within a short distance of the rear of the automobile. All had crossed safely but two. When plaintiff's intestate was behind the car, the chauffeur suddenly backed up without warning, according to plaintiff's witnesses. The boy caught hold of one of the extra wheels carried on the back of the car, and attempted to pull himself up. The wheel, being loose, swung around with him, and he was thrown beneath one of the rear wheels and the car stopped, resting on his body. A postman called to the chauffeur and he started the car forward, the boy got up, took a few steps and fell, and shortly died.

Upon this evidence we would not interfere with the verdict of the jury either in the finding of the fact of the chauffeur's negligence or the freedom from contributory negligence on the part of the plaintiff's intestate. Upon the issue of the chauffeur at that time being engaged in the defendant's business or acting within the scope of his employment, I am of opinion that the verdict is not only contrary to the weight of the evidence, but contrary to the law applicable to the case.

Nash was going to his home on an errand of his own, in no manner connected with his employer's business or affairs. His testimony was corroborated by the uncontroverted testimony of several other witnesses. When interrogated by a clerk in the employ of plaintiff's attorney shortly after the accident, he stated that he had permission to use the car to go home when he worked nights. Giving this testimony full credence, still under the rule laid down in *Reilly v. Connable* (214 N. Y. 586, 590), which case in this regard is very similar to the case under consideration, the defendant could not be held liable. The court said: "The fact that the chauffeur caused the injuries during the period of his employment does not make the defendant liable. If the employee in doing any act breaks the connection between himself and his employer, the act done under those circumstances is not that of the employer. Nor would the defendant's permission or acquiescence in the use by his chauffeur for the personal business or pleasure of the chauffuer make the defendant liable."

The court charged the jury: "You have a right to ask yourselves the question, if the chauffeur were dismissed temporarily at half-past six and directed to return at half-past

eight and had the consent of the defendant to use the car to go to his home that evening, and it was necessary for the chauffeur to go to his home, and in order to return to his employer at half-past eight, he had to take the car, is it fair to infer that he was engaged in his master's business? You have a right to ask yourselves that question, and to put the question in all of its various phases to one another, and conscientiously determine on all of the evidence in the case, whether or not the chauffeur was engaged in the defendant's business. If he were, of course, under the law, the defendant is chargeable with whatever the chauffeur did."

The defendant excepted to this charge, and it was clearly erroneous. (*Reilly v. Connable, supra.*) In the *Reilly* case the chauffeur was ordered to return at nine o'clock, and the court said: "The fact that the chauffeur caused the injuries during the period of his employment does not make the defendant liable." In the instant case the chauffeur went home to get a registered letter. The excuse for taking the machine instead of taking a slower conveyance was not even that he could thus get his dinner and return in time for his evening appointment. It was because his wife was then pregnant and liable to be confined, and Nash thought the call was because of her condition. There was nothing in the evidence that would warrant the inference that the use of the machine would in any way facilitate or expedite his master's service.

The judgment should be reversed, with costs to the appellant, and the complaint dismissed, with costs to the defendant.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

AMERICAN MERCHANT MARINE INSURANCE COMPANY, Appellant,  
v. FORSIKRINGS-AKTIESELSKABET "NORDEN," Defendant.

WASHINGTON MARINE INSURANCE COMPANY, Respondent.

First Department, May 27, 1921.

**Attachment — motion by junior attaching creditor to vacate prior attachment — sufficiency of moving papers — ground on which prior attachment will be vacated — papers not so closely scrutinized as when motion made by owner of property attached.**

The right of a junior attaching creditor to move to vacate a prior attachment depends on his having a valid lien upon the attached property, and so the moving papers of the junior attaching creditor herein were fatally defective in that they did not contain a copy of the junior warrant, nor the complaint or affidavit upon which it was issued.

Furthermore, when a junior attaching creditor is moving to vacate a prior attachment, the question presented, in the absence of fraud or collusion, is, are there such jurisdictional defects as to render the prior attachment proceedings a nullity, and since the papers upon which the plaintiff's attachment was granted were clearly sufficient that attachment could not be vacated on a motion by a junior attaching creditor.

On a motion by a junior attaching creditor to vacate a prior attachment the complaint and affidavits on which the prior attachment was granted are not so closely scrutinized as when the motion is made by the defendant whose property was attached.

APPEAL by the plaintiff, American Merchant Marine Insurance Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of April, 1921, granting a motion of the respondent, a subsequent attaching creditor, to vacate plaintiff's warrant of attachment.

*Charles H. Stoll* of counsel [*Douglas C. Lawrence* with him on the brief], for the appellant.

*Joseph Thurlow Weed* of counsel [*William Otis Badger, Jr.*, attorney], for the respondent.

PAGE, J.:

The defendant Forsikrings-Aktieselskabet "Norden" is a foreign corporation created and existing by and under the laws of the Kingdom of Denmark, and not authorized to carry on an insurance business in the State of New York.



The plaintiff and defendant entered into an agreement in writing at Copenhagen, Denmark, whereby the defendant agreed to reinsure the plaintiff on part of all of its marine and war risk insurance, upon the terms and conditions therein specified; and as security for due performance of the obligation of the agreement by the defendant, and to provide the legal reserve required by the Insurance Department, the defendant agreed to maintain at all times, in the hands of the plaintiff, a sum equal to the first three months' gross premiums, less certain brokerage, discounts and expenses stipulated in the agreement.

The complaint alleges that this amounted to \$41,681.01, which sum was duly received by plaintiff from the defendant. Subsequent to the making of the agreement losses were sustained on risks insured by the plaintiff and reinsured by the defendant. Plaintiff demanded of the defendant that it pay to plaintiff its share of the said losses, amounting to the sum of \$40,125.70. Defendant failed and neglected to pay same. The plaintiff was thereupon compelled to pay same and by December 31, 1920, plaintiff had expended on behalf of defendant in payment of said losses and for defendant's account the sum of \$40,125.70. By these payments the security reserve fund was depleted by said amount. The legal reserve required by the Insurance Department of the State of New York on estimated losses on that portion of the risks insured by the defendant on December 31, 1920, was the sum of \$46,065.20. The defendant was indebted to the plaintiff on that date in the sum of \$40,125.70 with interest from December 31, 1920.

Upon a complaint stating these facts and an affidavit of the vice-president and treasurer of the plaintiff verifying the same upon the affiant's knowledge, and also stating that the defendant was a foreign corporation and that the amount of \$40,125.70 was due from the defendant to the plaintiff over and above all counterclaims known to the plaintiff, a warrant of attachment was issued to accompany the summons, and the attachment was levied.

Thereafter the Washington Marine Insurance Company commenced an action against the same defendant and levied an attachment on the property of the defendant and moved to vacate the attachment herein. The motion papers do not contain a copy of the junior warrant, nor the complaint or

affidavit upon which it was issued. We are informed by the affidavit of its vice-president that the Washington Marine Insurance Company has commenced an action against the defendant to recover the sum of \$21,753.04 because of the failure of the defendant to pay to the plaintiff certain sums due under a written contract of reinsurance, which sums thereafter became and now are an account stated.

The right of a junior attaching creditor to move to vacate a prior attachment depends on his having a valid lien upon the attached property. It is, therefore, necessary for him to present as a part of his motion papers the papers upon which his own attachment is founded. (*Tim v. Smith*, 93 N. Y. 87, 91.) The respondent having failed to prove that it had a valid attachment, its motion should have been denied.

Furthermore, when a junior attaching creditor is moving to vacate a prior attachment, the question presented, in the absence of fraud or collusion, is, are there such jurisdictional defects as to render the prior attachment proceedings a nullity? (*Van Camp v. Searle*, 147 N. Y. 150, 160; *Haebler v. Bernharth*, 115 id. 459, 463; *California Packing Corp. v. Kelly Storage & Distributing Co.*, 228 id. 49, 53; *Colcord v. Banco de Tamaulipas*, 191 App. Div. 94.) We have recently pointed out what the necessary jurisdictional facts are, and also that the complaint and affidavits are not so closely scrutinized on such a motion as when the motion is made by the defendant whose property was attached. (*Colcord v. Banco de Tamaulipas*, *supra*.) By these tests the papers upon which the plaintiff's attachment was granted are clearly sufficient. Therefore, even if the moving party's papers had not been fatally defective, the motion should have been denied.

The order should, therefore, be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ.,  
concur.

Order reversed, with ten dollars costs and disbursements,  
and motion denied, with ten dollars costs.

KAUMAGRAPH CO., Respondent, v. STAMPAGRAPH CO., INC.,  
and Others, Appellants, Impleaded with ARTHUR TURNER  
and Others, Defendants.

First Department, May 27, 1921.

**Injunction — when defendants will not be perpetually restrained from manufacturing articles by same processes used by plaintiff — conditions to authorize such injunction — when secret process or formula will be protected — enforcement of covenants ancillary to contracts of employment — restricting employees' right to labor.**

An injunction is improperly issued restraining the defendants perpetually from manufacturing articles by the same processes as used by the plaintiff, since the plaintiff had no proprietary right in the processes and secrets in question, where it appears that some of the members of a corporation so engaged had been at different times employees of the plaintiff under agreements not to disclose any of the secrets of the manufacture of any of the products produced by plaintiff, and it further appeared that some of these members had prior to their employment by plaintiff been employed by an English concern whose processes and secrets the plaintiff had used in the manufacture of its products, and there was no evidence that plaintiff used any secret process or had the exclusive right to use any process or machinery which the defendants were using.

To support such an injunction there must be adduced conditions of the strongest and most convincing character, as it is in restraint of trade and competition and is an inhibition upon a man's right to pursue his occupation, except for and in the interest of the plaintiff.

When a person has a secret process by which he is manufacturing an article for commerce, those who occupy a confidential relation, whereby they become possessed of the formula and method of manufacture, may not communicate such secret to competitors in business or engage in the same business and use the knowledge thus acquired to the detriment of the employer.

An employer does not lose his rights by communicating the results of his work to persons, even if many, in confidential relations to himself, under a contract not to make it public, and strangers to the trust will be restrained from getting the knowledge by inducing a breach of trust and using knowledge obtained by such breach. So, where the employer has developed new processes, and all the knowledge the employees have of these secret processes was gained as an incident to their employment, the rights of the employer will be enforced by the courts. But where the plaintiff in a case wholly fails to prove facts tending to show that any such condition exists, or that said plaintiff was using any secret process or had any exclusive right to use the process or machinery which the defendants were using, no protection will be given.

Covenants ancillary to a contract of employment restricting the employees' right to labor along the same line either for themselves or for others upon the termination of their employment are not favored by the law, and will not be enforced, unless there are special circumstances that render the restriction a reasonable protection to the employer's business, to prevent the employee from using knowledge *that he has acquired in the course of his employment*, of the secrets of the trade, methods or processes of the employer; and if the covenant taking these circumstances into consideration is not more extensive as to time or space than will afford a reasonable protection to the employer's business, it will be enforced.

However, where the employee brings to the employment skill previously acquired, and does not obtain, in the course of his employment, knowledge of methods and processes which are exclusively within his employer's control and right to use, it cannot be said that such a restraint is reasonably necessary to the employer's protection.

Contracts by employees, unreasonably limiting their right to pursue their trade or occupation in the future, are held to violate public policy, because the employees' means for procuring a livelihood for themselves and families are thereby diminished.

The purpose of the covenant in the instant case is not for the protection of the plaintiff from the revelation or use of secrets of its business, but is to remove from possible competition one whose knowledge and skill, acquired before he came into plaintiff's employ, has been found valuable to it and to prevent that same knowledge and skill being utilized for the benefit of himself and others, after he has ceased to be employed by plaintiff, and, therefore, such a covenant is an unreasonable restraint of trade and competition and not enforceable in a court of equity.

An injunction should not issue on behalf of a former employer against employees who had terminated their employment, where it appears that they were using a formula to which the plaintiff had no proprietary right, and had purchased two machines from the person who made machines for plaintiff, but the machines were not patented and the manufacturers were not bound to sell only to plaintiff, as such evidence does not show use by defendants of any secret process of the plaintiff.

APPEAL by the defendants, Stampagraph Co., Inc., and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of July, 1920, on the decision of the court rendered after a trial at the New York Special Term.

Alexander S. Andrews of counsel [Edward J. Martin with him on the brief], for the appellants.

Julius Henry Cohen of counsel [J. Ard Haughwout with him on the brief; Esselstyn & Haughwout, attorneys], for the respondent.

PAGE, J.:

The plaintiff has been granted, except as to the defendant Waaler, a most comprehensive decree, perpetually enjoining and restraining the defendants, their agents, servants, employees, representatives or other persons in any manner connected with them or any of them, (1) from manufacturing, selling, advertising or offering for sale, directly or indirectly, any transfer trade-mark stamps, embroidery designs, indelible letters, figures, or other similar articles made by the process known as the Kaumagraph dry process, or by the same process under any different or other name and from employing said process or the secret formula or formulas, machinery, dies, engravings or information used in connection with or forming a part of said process; (2) from disclosing to any other person, real or in law (*sic*), the said process or any part thereof, or any of the formulas, machinery, dies, methods of engraving or trade secrets used by said plaintiff in connection with said process; (3) from manufacturing, except for and at the request of the plaintiff, any machine or die to be used in manufacturing or producing transfer trade-mark stamps, embroidery designs, indelible letters, figures, or other similar articles by said process; and the decree further directs the Stampagraph Co., Inc., to account to plaintiff for all sales or contracts of sale made by it for any of the above specified articles.

To support such an injunction there must be adduced considerations of the strongest and most convincing character, for it is a perpetual restraint on these parties from prosecuting a business, and on some of them from engaging at any time in a trade or occupation in which they have spent a large portion of their lives. It is in restraint of trade and competition, and is an inhibition upon a man's right to pursue his occupation, except for and in the interest of the plaintiff.

The reasons stated by the learned justice at Special Term for his decision are twofold: *First*, that two of the defendants had made contracts of employment with the plaintiff in which were negative covenants against engaging in a similar occupation; and *second*, that the plaintiff was engaged in manufacturing under a secret process and that the defendant Turner, after leaving plaintiff's employ, had joined with the

defendants George H. Chadwick, Mary Calrow, Harry A. Himer and Alexander W. Moffat in organizing and incorporating the Stampagraph Co., Inc., for the purpose of manufacturing and selling some of the same articles made by the same process as that used by the plaintiff.

When a person has a secret process by which he is manufacturing an article for commerce, those who occupy a confidential relation, whereby they become possessed of the formula and method of manufacture, may not communicate such secret to competitors in business or engage in the same business and use the knowledge thus acquired to the detriment of the employer.

"Courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment. And it matters not, in such cases whether the secret be secrets of trade, or secrets of title, or any other secrets of the party important to his interests." (2 Story Eq. Juris. [14th ed.] § 1283.)

"The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. \* \* \* The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach." (*Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 250.)

These principles are well settled and have been recently declared and enforced by our courts. (*Vulcan Detinning Co. v. Assmann*, 185 App. Div. 399; *Eastman Kodak Co. v. Powers Film Products, Inc.*, 189 id. 556.) In these cases the plaintiff had developed a new process for producing the results obtained; all the knowledge that the employees had of this secret process they had obtained in the course of their employment by the plaintiff and as a necessary incident of their employment. In order to bring itself within the protection of these equitable principles it was necessary for the plaintiff to prove that it was employing in its business a secret process either developed by itself, or the sole right to use which had been acquired by

it from the discoverer of the process. The plaintiff in the instant case wholly failed to prove facts tending to show any such condition to exist.

The plaintiff is engaged in the business of manufacturing and selling designs printed upon tissue paper with a composition that will transfer the design to a fabric when the paper is laid face down upon the fabric and a heated iron applied to the back of the paper. These designs are used for transferring trade marks and lines for embroidery or pattern cutting. The manufacture and sale of such transfer designs had been known and carried on in England, and in more limited extent in this country, for many years before the plaintiff was organized. One of the principal concerns in the business was William Briggs & Co., Ltd., of Manchester, Eng., who had a representative in this country selling their product or manufacturing similar designs by their process. The process they employed was that patented by John Briggs in 1874 in England and in the United States by his executors in 1879, and an improvement in such process patented in England by Joseph Scott. The Briggs patent covered a transfer of pattern to fabric "by printing the pattern paper from a surface block or otherwise, as usual with the design to be produced in a bituminous substance or varnish, and transferring the said pattern to the fabric when required by the application of heat to the back of the paper," and stated: "We make no claim to any process or apparatus for printing the patterns in bituminous substance or varnish on the pattern paper as they may be printed by blocks, or cylinders, or otherwise." The Scott patent covered an improvement on the Briggs patent by adding a metallic powder to the existing process, thereby preventing running or spreading on the application of heat. This patent set out the formula which is substantially the same as that used by the Stampagraph Co., Inc. Shortly prior to 1902, one J. C. Jack visited England and learned of the process used by William Briggs & Co., Ltd., and met and discussed the matter with the defendant George Chadwick and William Scott who were then in the employ of William Briggs & Co., Ltd. Chadwick had been so employed for thirteen or fourteen years and Scott for three or four years. Jack suggested that Scott and Chadwick leave

Briggs' employ and come to the United States for the purpose of establishing the business here. On Jack's return an association of five persons, of which Jack and Munroe, the plaintiff's president, were members, was formed to engage in the business of making transfer stamps, under the name of the Kaumagraph Co. Jack then entered into negotiations with Scott, as a result of which a contract was made, dated September 3, 1903, which recited that Scott and Jack owned and had possession of certain machinery, patents, formulas, apparatus, processes, etc., for the production of trade-mark stamps, indelible letters, embroidery transfer designs, etc., known generally as the transfer design process, and desired to become associated with the other four members of the association. The contract provided for the formation of a corporation to be known as the Kaumagraph Co. in which Scott and Jack were to have a forty-five per cent interest and the others fifty-five per cent. The four persons agreed to furnish the capital to conduct the business for an initial period of six months with a stipulation limiting their united liability to \$1,200. The sum of \$350 was to be advanced to enable William Scott to come to New York bringing with him necessary machinery and designs to establish the business. Scott was to be paid \$7.50 per week for a period of six months, dating from the time of the erecting of the machinery in working order. Scott and Jack on their part agreed to hold the formulas, patents, machinery, designs, etc., exclusively for the use and furtherance of the business therein contemplated, and under no circumstances were any designs, machinery, formulas, patents or merchandise or information relating to the business to be transferred or communicated to any other party or parties.

The \$350 was sent to William Scott and he came to this country, bringing with him some machinery and the knowledge of the process used in the business conducted by William Briggs & Co., Ltd. Neither Scott nor Jack was owner or licensee of any patents or secret formulas. Monro, the plaintiff's president, testified that he had obtained a copy of the Scott patent and that it was the underlying basis for all of the plaintiff's work, experiments and improvements. About four months after Scott came to this country, George



Chadwick came over and immediately entered into the employ of the association. About two months thereafter a written contract of employment was entered into between the association known as the Kaumagraph Co. and Chadwick, which recited that Chadwick desired to be employed in the capacity of "an expert workman in the production of dies, trademark stamps, embroidery designs, indelible letters, etc., by a process advertised and now popularly known as the Kaumagraph Process." Chadwick was hired for a period of ten years at a salary of fifteen dollars per week for the first six months and twenty dollars per week thereafter if the increase of the business should warrant it; and the contract contained other provisions which will be considered hereafter. In 1905 the plaintiff was incorporated as successor to, and under the name of, the association. Chadwick continued in the employ of the plaintiff until after this action was tried. The defendant Arthur Turner, who was George Chadwick's brother-in-law, had also been employed by William Briggs & Co., Ltd., in Manchester, Eng. He came to New York in 1907 and was employed by the plaintiff, and after he had worked for about three months he signed a contract of employment for a term of ten years at a salary of fourteen dollars per week, which also contained the negative covenant which will be later considered. His employment ended with the termination of this contract.

Thus it would appear that all the plaintiff did was to appropriate a process of manufacture of transfer stamps that had been in use for many years before plaintiff obtained the knowledge of the process. Calling the process by a different name gave them no exclusive rights in the thing itself. It was thus proved that the plaintiff, when it commenced to manufacture, used the process and machinery theretofore used by William Briggs & Co., Ltd.

Counsel claims that the plaintiff has made improvements. If so, what were they? The defendant had the same right to use the process and machinery which had been used by William Briggs & Co., Ltd., as did the plaintiff. If there were changes and improvements in the formulas or in the machinery which did not result merely from skill in manipulation acquired by experience or from the application of well-

known mechanical devices, but which were such as to constitute invention, the plaintiff should have proved what they were, so that an injunction could be issued that would warn the defendants explicitly of the things prohibited and protect the plaintiff in the use of the improvements in which it was entitled to be protected. In no other way could the court determine the issue of fact, or frame an injunction that would intelligently apprise the defendants of the limitation put upon the legitimate use of the process and machinery by them. Nor could the court, if it should be claimed that the injunction had been violated, in such proceeding decide the issue of fact, and determine whether the injunction had been violated. As was suggested by the Court of Errors and Appeals of New Jersey: "For the protection of the complainant, the usual course is to take the evidence as to the secret in camera, as was done in *Stone v. Grasselli Chemical Co.*† \* \* \* It is not necessary to embody the description of the secret in the injunction itself. The testimony taken in camera may be sealed and used only when it becomes necessary to determine whether there has been a violation. It is true that the procedure involves a risk to the complainant of his secret becoming public; but that difficulty is inherent in the subject. It is a difficulty to which the complainant must submit if he seeks to retain the benefit of his secret for an indefinite time, and is not content with the more effective protection for a shorter period which is offered by our copyright and patent laws." (*Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, 690.) The plaintiff in the instant case failed to prove that it used any secret process or had any exclusive right to use the process or machinery which the defendants were using.

There remains the question of the plaintiff's right to enjoin the defendants George Chadwick and Arthur Turner by virtue of the negative covenants in their contracts.

The first agreement with George Chadwick contained a covenant that under no circumstances nor at any time would Chadwick "engage in any business similar to, or conflicting with, the business of the Kaumagraph Company, or produce dies, trade-mark stamps, embroidery designs or

† 65 N. J. Eq. (20 Dick.) 756.—[REp.]

indelible letters by said Kaumagraph process or any similar process, except as herein provided, without the written consent of the " plaintiff. On February 1, 1909, six years before this contract expired, the plaintiff insisted on a new contract for a term of ten years from that date. To this Chadwick objected, and a new contract was prepared for the unexpired term of the first, which Chadwick signed. This provided for payment of a salary of thirty-five dollars per week for the first year and forty dollars per week thereafter, and further provided: " In consideration of the foregoing the party of the second part agrees that he will remain in the employ of the party of the first part for a period of six years from the date hereof and in consideration of the agreements hereinbefore set forth, party of the second part agrees that he will not at any time engage in any business similar to or conflicting with the business of the said Kaumagraph Company or produce dies, trade-mark stamps, embroidery designs or indelible letters by any one or more of the processes employed by the said Kaumagraph Company or by any similar processes or manufacture, or produce such articles or engage in such processes in any way by sale or otherwise connected with the trade within the territory of the United States east of the Mississippi River or in the Dominion of Canada, without first securing the written consent of the party of the first part." The contract further provided that it should " continue in full force as to all its stipulations for an indefinite period after the date of its expiration, until terminated by notice in writing from either party one year in advance."

In the latter part of the year 1918 George Chadwick was reduced from the position of superintendent, and a man with no previous experience in the business was put over him; and on January 13, 1919, he gave the plaintiff one year's notice in writing of the termination of the contract. He did no act in violation of his agreement, nor so far as the proof shows was he disloyal to his employer. The sole justification for enjoining him was his statement that when he left the plaintiff's employ he should go into a similar business. It must be borne in mind that Chadwick for thirteen or fourteen years before he entered into the plaintiff's employ had worked for the William Briggs & Co., Ltd. It was because of his knowl-

edge of and skill in the business that plaintiff employed him. He worked for the plaintiff for about sixteen years. Thus thirty years of his life had been spent in this one employment. While he worked for plaintiff his salary ranged from fifteen dollars to forty dollars per week. The judgment goes beyond even the terms of the negative covenant; it is unlimited as to time or space. George Chadwick by the decree is perpetually enjoined from ever again in any place working at the only trade he knows. Under this decree he could not return to England and engage again with William Briggs & Co., Ltd. He must work hereafter for the plaintiff or not work at all at the only trade he knows. The books will be searched in vain for a precedent for so unjust and oppressive a decree. As has been well said: "Such a restraint savors of servitude, unrelieved by an obligation of support on the part of the master." (*Taylor Iron & Steel Co. v. Nichols, supra.*) Had the decree followed the terms of the covenant and contained a limitation as to space, it could not be sustained. The person who drafted this covenant evidently had in mind the case of *Diamond Match Co. v. Roeber* (106 N. Y. 473) and similar cases where covenants not to engage in the same business for a limited time and within a limited territory have been enforced. But in those cases the covenant was ancillary to the sale of a business and it was held that such a restraint within reasonable limits was not an unreasonable restraint upon trade, such a restriction being necessary to the protection of the good will of the business sold and the purchase price furnishing an adequate consideration therefor. Covenants ancillary to a contract of employment restricting the employees' right to labor along the same line either for themselves or others upon the termination of their employment are not favored by the law, and will not be enforced, unless there are special circumstances that render the restriction a reasonable protection to the employer's business, to prevent the employee from using knowledge *that he has acquired in the course of his employment*, of the secrets of the trade, methods or processes of the employer. If the covenant taking these circumstances into consideration is not more extensive as to time or space than will afford a reasonable protection to the employer's business, it will be enforced. (*McCall Co. v.*

*Wright*, 198 N. Y. 143; *Eastman Kodak Co. v. Powers Film Products, Inc.*, *supra.*) Where, however, the employee brings to the employment skill previously acquired, and does not obtain, in the course of his employment, knowledge of methods and processes which are exclusively within his employer's control and right to use, it cannot be said that such a restraint is reasonably necessary to the employer's protection. (*Mandeville v. Harman*, 42 N. J. Eq. 185; *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6; *affd.*, 169 Mo. 388; *Herreshoff v. Boutineau*, 17 R. I. 3; *Bingham v. Maigne*, 20 J. & S. [52 N. Y. Super.] 90; *Witkop & Holmes Co. v. Boyce*, 61 Misc. Rep. 126.)

In contradistinction to the sale of a business an employee ordinarily receives no consideration other than the fact of present employment; his labor is a full return for his wage. Contracts by employees, unreasonably limiting their right to pursue their trade or occupation in the future, are held to violate public policy, because the employees' means for procuring a livelihood for themselves and family are thereby diminished. They are deprived of the power of usefulness, and the public is deprived of the benefit of the exercise by them of their knowledge and skill. The purpose of the covenant before us is not to protect the plaintiff from the revelation or use of the secrets of its business, for it is not so limited; but it is to remove from possible competition one whose knowledge and skill, acquired before he came into its employ, has been found valuable to it and to prevent that same knowledge and skill being utilized for the benefit of himself and others, after he has ceased to be employed by plaintiff. Such a covenant is an unreasonable restraint of trade and competition and will not be enforced in a court of equity.

Arthur Turner was employed at a salary of fourteen dollars per week and his contract contained a covenant in language almost identical with that in George Chadwick's second agreement. When this contract was about to expire, a new contract was prepared. The person who drew the contract seemed fearful that the words "at any time" might be construed to mean at any time during the term of the contract, and, therefore, the new contract provided "at any time before or after

the termination of this contract." This contract Turner refused to sign and he was thereupon discharged. Nevertheless he is now bound by this decree never at any time or place to enter into a similar or competing business. Mary Calrow, working for the defendant as typewriter and office clerk, knowing nothing of the alleged secrets or process of manufacture, not claimed to have copied or used any trade lists or brought any information that she could not properly bring to the new enterprise, is perpetually enjoined without limitation of time or place from engaging in a similar or competing business, although she never signed any agreement, but worked from week to week with no term. George H. Chadwick, who worked for the plaintiff a few weeks during his school vacation as a boy having no special knowledge of the business, is likewise forever enjoined; and Moffat and Himer, who never had any previous connection with the plaintiff, are also perpetually enjoined.

The Stampagraph Co., Inc., was organized by Arthur Turner, George H. Chadwick, Mary Calrow, Henry A. Himer and Alexander W. Moffat in March, 1919, with a capital of \$2,000; and is manufacturing some of the articles that the plaintiff manufactures under the process set forth in the Scott patent. They purchased two machines from the person who made machines for the plaintiff. As the machine was not patented and the manufacturer was not then bound by agreement not to manufacture them for others, he had a right to sell and they to buy. The evidence does not show that the defendants are using any secret process of the plaintiff.

The judgment and findings inconsistent with this opinion should be reversed, with costs, and judgment directed for the defendants, with costs.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Judgment reversed, with costs, and judgment directed for the defendants, with costs. Settle order on notice.

E. MOCH COMPANY, Respondent, v. BRYANT PARK BANK,  
Appellant.

First Department, May 27, 1921.

**Banks and banking — action to recover money deposited in name of plaintiff — bank may rely on certificate of secretary of depositor that president was also treasurer and had authority to draw checks — checks of plaintiff signed by third person as treasurer and deposited in defendant bank not notice of lack of authority — failure to show that plaintiff was damaged by alleged unauthorized deposit — laches — estoppel.**

In an action to recover money deposited in the plaintiff's name in defendant bank it appeared that the plaintiff's then president opened the deposit through the vice-president of the defendant, that on the demand of said vice-president there was filed with the defendant a certificate executed by the plaintiff's secretary under the corporate seal which purported to set forth the minutes of plaintiff's board of directors some three years before the deposit was made and a resolution passed at that time stating that "Eugene Moch was duly elected president" and also as "treasurer" and "that all checks, notes and drafts and orders for the payment of money be signed by the president Eugene Moch, and countersigned by the treasurer Eugene Moch." It did not appear for whose benefit the money so deposited and checked out was used, whether for the benefit of the president personally or for the benefit of the plaintiff and there was no intimation that the secretary had any personal interest in the opening of the account. The account was closed about four years before this action was instituted.

*Held*, that the defendant was justified in relying on the certificate signed by the plaintiff's secretary bearing the seal of the plaintiff.

The defendant was not chargeable with knowledge of the lack of authority on the part of the plaintiff's president to sign checks as treasurer by the fact that the president, who had a personal account with the defendant, deposited checks of the plaintiff in that account which were countersigned by another person as treasurer of the plaintiff.

The plaintiff failed to show that it was actually deprived of moneys by reason of the alleged unauthorized deposit, and it did not explain why it waited nearly four years before it notified the defendant of the fact that the account had been improperly opened and why during that time it did not ascertain that the check with which the account was opened and which was the principal deposit, had been diverted and not deposited in its regular bank.

The issuance of the certificate by the secretary of the plaintiff that its then president was its president and treasurer and authorized to sign its checks, estopped plaintiff from denying the truth of the representation of its secretary.

APPEAL by the defendant, Bryant Park Bank, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of December, 1919, on the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 5th day of January, 1920, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*Benjamin L. Fairchild* of counsel [*James W. McElhinney*, attorney], for the appellant.

*William Bondy*, for the respondent.

GREENBAUM, J.:

The complaint alleges in paragraph III that between September 18 and December 6, 1908, defendant received moneys of and belonging to the plaintiff to and for "the use of the plaintiff, amounting in the aggregate to the sum of \$15,180.35," which the defendant refused to pay to the plaintiff although duly demanded.

Plaintiff called a single witness to compute the amount of interest upon the claim and rested.

The evidence on behalf of the defendant uncontradictedly establishes the following facts: When the account was opened with the defendant bank its vice-president and cashier told Eugene Moch, who was then president of the plaintiff corporation, that no moneys could be withdrawn from the account unless he first obtained a certificate from the plaintiff showing who were authorized to draw against the account. A printed blank form was handed to the plaintiff's president for the purpose of having it filled out as a certificate of authority.

The certificate was duly filed with the defendant signed by the plaintiff's secretary with the seal of the plaintiff corporation. It purported to set forth the minutes of the plaintiff's board of directors of December 31, 1905, and a



Indeed, he testified that he never observed any checks of the plaintiff with the signature of Brodie as treasurer. It would scarcely be expected under the circumstances disclosed and where the checks deposited in Moch's personal account were in fact of comparatively small amounts, that an executive officer would charge his mind with the name of the person who countersigned such checks.

We are of opinion that there should have been evidence on the part of the plaintiff showing that it actually was deprived of moneys by reason of the alleged unauthorized deposit. We also think that there should have been some explanation why plaintiff waited nearly four years before it notified the bank of the fact that the account had been improperly opened and a further explanation why during that period of years the plaintiff did not ascertain that the check for upwards of \$13,000 of Sears, Roebuck Company with which the account had been opened had been diverted and not deposited in the Union Exchange Bank which it was stated was its regular depository.

We are also of the opinion that the issuance of the certificate of the secretary of plaintiff, that Moch was its president and treasurer and authorized to sign its checks, estopped plaintiff from denying the truth of the representation of its secretary. (*New York & New Haven R. R. Co. v. Schuyler*, 34 N. Y. 30.) In that case the court said (at p. 68): "It is impossible to escape the conclusion that the law of this State, as settled by adjudication at this day, is, as put by H. R. SELDEN, J., in *Griswold v. Haven* [25 N. Y. 595] 'that where the authority of an agent depends upon some facts outside the terms of his power, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact.'"

At page 73 the court said: "We may come back, therefore, to the solid ground of the *North River Bank v. Aymar* [3 Hill, 262] regarding it only as shaken down to greater firmness by the severe ordeal of the *Farmers and Mechanics' Bank* case\* and with confidence declare the true doctrine of this branch

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\* *Farmers & Mechanics' Bank of Kent County v. Butchers & Drovers' Bank* (16 N. Y. 125). — [REp.]

of the law of agency to be that where the principal has clothed his agent with power to do an act upon the existence of some intrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. \* \* \* In this view, I see no ground upon which the plaintiffs can, in this case, be permitted to deny that Schuyler was acting within the scope of his authority in issuing the false certificates; and they are therefore to be treated as though issued by the board of directors."

At page 70 the court in the *Schuyler* case refers to the well-recognized rule that "Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

In *Fifth Avenue Bank v. F. S. S. & G. S. F. R. R. Co.* (137 N. Y. 231), which was a case involving the issuance of a forged certificate of stock signed by the president, the court said (p. 237): "With respect to this certificate we fail to discover any omission on the part of the plaintiff which would impeach its character as a *bona fide* holder. It made inquiry at the office of the defendant, where its books and records were kept, and of the officer in charge, whose duty it was to furnish correct information upon the subject, and it had no reason to suspect that the assurances it received were misleading or false, or that the officers of the defendant had entered into a conspiracy with Hofele to defraud the public. It resorted to the only source of verification of the truth of Hofele's statements which was readily accessible; and it exercised all the care and vigilance which a prudent man would be expected to exhibit in the ordinary course of the business in which it was engaged."

This is not a case where the secretary of the corporation was individually interested in the transaction which resulted in the opening of the deposit account with defendant and where the latter knew or had reason to suspect that the plaintiff's secretary had any personal interest therein. (*Manhattan Life Ins. Co. v. F. S. S. & G. S. F. R. R. Co.*, 139 N. Y. 151.)

On the contrary, there is not here the slightest intimation that the secretary of the plaintiff, who issued the certificate in his official capacity, upon which defendant relied had any personal interest or benefit in the opening of the bank account with the defendant.

The judgment and order must be reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

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THE PEOPLE OF THE STATE OF NEW YORK, on the Complaint of JOSEPHINE HOUTMAN, Respondent, v. ANDREW HOUTMAN, Appellant.

First Department, May 27, 1921.

**Crimes — disorderly conduct — failure to support wife and child — Inferior Criminal Courts Act, § 74, construed — separation pursuant to agreement not defense — evidence insufficient to sustain conviction.**

Under section 74 of the Inferior Criminal Courts Act of the City of New York, as amended by chapter 339 of the Laws of 1919, a person who neglects adequately to provide for his wife or children, or neglects to provide for them according to his means, may be convicted as a disorderly person.

The fact that a husband and wife are living apart under a separation agreement providing for the support of the wife and child does not deprive the court of jurisdiction.

The conviction of the defendant as a disorderly person was improper, where it appeared that he had paid his wife regularly for the support of herself and child the amount stipulated in a separation agreement, that the last payment was made the day before the proceedings were instituted, and that there was no evidence of a request or demand for an increased allowance because of inadequacy or any other grounds warranted under the law and of his refusal to comply therewith.

APPEAL by the defendant, Andrew Houtman, from a judgment and order of the Court of General Sessions of the Peace

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in and for the county of New York, entered in the office of the clerk of said court on the 13th day of October, 1920, affirming the conviction of the defendant of being a disorderly person, in failing to provide adequately for his wife and child, rendered in the Domestic Relations Court, Borough of Manhattan, City of New York, First Division, on the 18th day of May, 1920.

*James A. Blanchfield*, for the appellant.

*Henry J. Shields* of counsel [*John F. O'Brien* with him on the brief; *John P. O'Brien*, Corporation Counsel], for the respondent.

GREENBAUM, J.:

The return of the magistrate shows that the defendant was arraigned in the Domestic Relations Court in the borough of Manhattan on the 18th day of May, 1920, on the affidavit and complaint of Josephine Houtman of 131 East One Hundred and Sixteenth street; "that she is the wife of Andrew Houtman the defendant, who has one child dependent upon him for support; that the said defendant did on or about the 17th day of May, 1920, neglect to provide adequately for deponent and child by reason of which they are without adequate support or in danger of becoming a burden upon the public; that the defendant had not contributed to their support since the 17th day of May, 1920; that the defendant is fully able to support deponent and child."

The testimony taken before the magistrate was exceedingly meagre and may be briefly summarized as follows: Plaintiff testified that she was married in 1914; that she does not live with her husband; that he did not desert her, but that they mutually agreed to separate; that he paid her regularly weekly twelve dollars in accordance with the terms of the agreement made with her when they separated; that his last weekly payment was made on the day before her complaint to the court; that she is living with her parents and giving them ten dollars per week for the support of herself and her child, a boy five years of age; that up to twelve days before the hearing she had been receiving twenty dollars per week as a dancer; that on account of prohibition she is not now able to

receive as much, but has been receiving eight dollars per week; that she needs five dollars per week more and that her husband earns thirty-five dollars per week as she has been informed.

Defendant testified that he was earning from thirty to thirty-five dollars per week; that he lives with his parents to whom he pays eleven dollars a week board and that he has other expenses. Neither party was represented by counsel. The magistrate did not ask what his expenses were nor was the complainant asked by the magistrate what her expenses were, outside of the weekly board.

The provision of law under which this proceeding was prosecuted is section 74 of the Inferior Criminal Courts Act of the City of New York (Laws of 1910, chap. 659), as amended by chapter 339 of the Laws of 1919, and reads in part as follows: "The following persons are declared to be disorderly persons: Every person in the city of New York who actually abandons his wife or children without adequate support; \* \* \* or who neglects to provide for them according to his means or who threatens to leave his wife or children without adequate support, or in danger of becoming a burden upon the public; \* \* \*. If upon examination of said defendant, it shall appear by the confession of the defendant, or by competent testimony, that he is a disorderly person, the said magistrate shall make an order specifying a fair and reasonable sum of money according to his financial ability, to be paid weekly or otherwise by said defendant \* \* \* for the support of his wife, children, \* \* \* as the case may be, \* \* \*. The wife, children \* \* \* aforesaid, is (*sic*) hereby declared to be a primary beneficiary of the order, and evidence that they are without means shall be presumptive proof of their liability to become a charge upon the public; and the person against whom proceedings are begun as a disorderly person shall be taken to be of sufficient financial ability to contribute to the support of the wife, children, \* \* \* as the case may be unless the contrary shall affirmatively appear to the satisfaction of the court or judge thereof."

Defendant relies upon certain authorities which construed statutes under which a magistrate had jurisdiction to convict a defendant as a disorderly person, as they existed before the

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enactment of chapter 339 of the Laws of 1919. It will be observed that under the existing law a person *who neglects adequately to provide* for his wife or children, or "who neglects to provide for them according to his means," may be declared a disorderly person.

The law as it now reads is in many respects radically different from the prior laws and it confers wide discretion upon the Domestic Relations Court. The fact that the parties had separated pursuant to an agreement providing for the support of the wife and child did not oust the magistrate from jurisdiction.

In *Kingsbury v. Sternberg* (178 App. Div. 435, 437, 438) the court said: "It has been held that the existence of a separation agreement and an interlocutory decree of divorce in favor of the husband does not preclude his conviction as a disorderly person in failing to support his wife (*People v. Meyer*, 12 Misc. Rep. 613) and that even a final judgment of divorce or separation containing a provision for the support of the wife and children is no bar to a conviction of the husband for failing to support his children." (Citing cases.)

It seems to us, however, that the testimony before us was entirely insufficient to warrant the action which the learned magistrate took. The defendant had been paying regularly the amount which he and his wife had agreed upon. All that appears is that he paid her twelve dollars a week which was in accordance with their agreement and that because she was temporarily unable to earn as much money as she had been earning twelve days before the hearing, she precipitately haled her husband into court for an increase in her allowance on the day after he had paid her the weekly amount agreed upon.

In view of the scant testimony adduced and of the fact that defendant had been regularly paying the agreed weekly allowance up to the day before the complaint was lodged against him that he was a disorderly person, there should have been some evidence of a request or demand upon him for an increased allowance because of inadequacy or any other grounds warranted under the existing law and his refusal to comply therewith, before being summoned into court.

The defendant's attorney in his brief practically concedes the propriety of increasing the amount of the wife's allowance,

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but he urges that the stigma of the defendant being a "disorderly person" should be removed by a reversal.

We think that under the facts here appearing the defendant's attention should have been directed before coming into court to the plaintiff's claim of a changed situation which justified an additional allowance for herself and her child so as to enable him either to comply with or refuse her request and afford him an opportunity to defend himself against the charge of being a disorderly person.

The order should be reversed and the proceeding dismissed.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ.,  
concur.

Order reversed and proceeding dismissed. Settle order on notice.

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PALISADE CURTAIN COMPANY, INC., Appellant, v. MAE C.  
KORN, as Executrix, etc., of EDWARD KORN, Deceased,  
Respondent.

First Department, May 27, 1921.

**Sales — action to recover purchase price — laches in rejecting goods — trial — appeal — when verdict of jury will be set aside.**

In an action to recover the purchase price of very cheap, plain curtain scrim, wherein it appeared that the plaintiff had made deliveries during several months, that the defendant did not examine the goods delivered during the first two months but sold them directly from the cases, that for five months after the deliveries began the defendant made no written complaint as to the quality of the goods, but at one time did request as a favor that shipments be deferred until a later date, the rejection of the goods by the defendant, on the ground that they were not of the quality purchased, made five months after deliveries began and after the price of the goods had begun to decline was too late to relieve the defendant of his liability to pay the purchase price.

While the court, whether at Trial Term or on appeal, ordinarily is loath to disturb the verdict of the jury upon conflicting testimony there should be no hesitancy in setting aside a verdict where the undisputed evidence and the probabilities clearly indicate that it was contrary to the weight of the evidence.

APPEAL by the plaintiff, Palisade Curtain Company, Inc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 25th day of January, 1921, on the verdict of a jury, and also from an order entered in said clerk's office on the 18th day of January, 1921, denying plaintiff's motion to set aside the verdict and for a new trial made upon the minutes.

*I. Maurice Wormser* of counsel [*David Harrison*, attorney], for the appellant.

*Maximilian Bader* of counsel [*Samuel Hellinger* with him on the brief; *Edward J. Kelly*, attorney], for the respondent.

GREENBAUM, J.:

The action is for goods sold and delivered. Plaintiff sold and defendant's testator (hereinafter called defendant) bought 1,000 pieces of very cheap, plain curtain scrim, the order being placed December 8, 1919. The deliveries began in January, 1920, and continued through February, March, April and May and payments were made thereon during these months from time to time. The defendant never examined the goods delivered in January and February, but sold them directly from the cases without assorting them. The market price of these goods reached its peak in April and then declined and shortly thereafter payments by the defendant became slow. During all this time defendant made no written complaint as to the quality of the goods, and according to plaintiff's testimony there had been no oral complaint. One Patterson, defendant's brother-in-law, and manager in the business, however, testified that he orally complained about the condition of the goods to plaintiff, during the months mentioned, over the telephone. He admitted that he did not tell his principal, the defendant, of these complaints although it ordinarily was his duty to do so. On May twentieth defendant wrote the plaintiff the following letter: "On account of the congestion in our store and embargoes, we would ask you to please make no further shipments before July 1st. Hoping that you will find it convenient to comply with our



request and thanking you for many favors, we are," etc. On May twenty-first defendant again wrote as follows: "Upon looking over your contract, we find that you overshipped on certain patterns. \* \* \* The writer has been sick and absent from the place and did not keep tabs on the general line which is new to me as explained to your salesman when taking the order, and we simply asked him if he cared to establish a steady customer, to guide us in this line, which he did to the best of his knowledge, I presume, but to my amazement our salesmen had no success with your line. We have actually your entire stock here. Please do not take it for granted that on account of present conditions we are writing the above letter to you, being that we are in the habit of taking our medicine, but we would ask you whether you have an output of this material elsewhere and we will be glad to re-sell this merchandise to you, if you are in a position to make us a fair proposition," etc.

One Frederick W. Day entered the defendant's employ in June, 1920. Shortly thereafter and on June twenty-second defendant sent a letter dictated by Day to plaintiff as follows: "We have communicated with you by phone several times for the purpose of having someone call upon us to adjust a claim we have against your shipments of 21 inch lace edge scrim. Many of these goods are distinctly seconds, run under quality and width and cannot be used. Will you please have a representative see us without further delay, as we wish to take action at once with reference to returning same." This letter was written, it will be noted, almost five months after the first delivery.

Plaintiff on the trial proved that the goods were known as a low grade merchandise and that fact was substantially conceded upon the trial by the defendant as was the fact that goods of that character were "never perfect."

While the court, whether at Trial Term or on appeal, ordinarily is loath to disturb the verdict of the jury, upon conflicting testimony, there should be no hesitancy in setting aside a verdict where the undisputed evidence and the probabilities clearly indicate that it was contrary to the weight of the evidence.

We have here an array of facts, which seem unmistakably

to point to but one conclusion and that is that the attempt to reject the goods was an afterthought due to the fall in prices of the commodity after April tenth.

The merchandise in question was admittedly sold as a very low grade "kind of goods." During the period of two months after delivery the cases in which the goods were sent had not been opened for examination and no written complaint was made until about five months later. On May twentieth the defendant wrote the plaintiff, requesting as a favor that no further shipments be made before July first, "on account of the congestion in our store and embargoes." On May twenty-first the defendant stated "that we are in the habit of taking our medicine," clearly referring to the fall in prices.

In view of the abundance of undisputed evidence in favor of plaintiff the verdict should have been set aside.

The judgment and order appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

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PAULINA SCHOENHOLZ, Respondent, v. NEW YORK LIFE INSURANCE COMPANY, Appellant, Impleaded with SARAH SCHOENHOLZ, Defendant.

First Department, May 27, 1921.

**Insurance—suit in equity to have plaintiff declared equitable owner of policy of life insurance and to recover proceeds thereof not action in rem—jurisdiction of non-resident defendant not acquired by service by publication.**

A suit in equity by a widow to have it declared that she is the equitable owner of a policy of insurance issued on the life of her husband payable, in the event of his death before a date specified, to his sister, who was

designated the beneficiary, and to have the designation of the beneficiary named therein canceled and declared null and void and to have it adjudged that the insurance company pay the proceeds of the policy to the plaintiff to whom the husband had promised to assign the policy in consideration of marriage, is not an action *in rem*, and, therefore, the court did not, by the service of the summons herein by publication, acquire jurisdiction of testator's sister, who was a non-resident of this State and did not appear.

LAUGHLIN and MERRELL, JJ., dissent, with opinion.

APPEAL by the defendant, New York Life Insurance Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 15th day of December, 1920, upon the decision of the court rendered after a trial at the New York Special Term.

*Louis H. Cooke* of counsel [*James H. McIntosh* with him on the brief], for the appellant.

*Reuben Dorfman*, for the respondent.

GREENBAUM, J.:

A previous judgment in this action in favor of the defendant New York Life Insurance Company rendered at Special Term of the Supreme Court dismissing the complaint upon the merits, was reversed upon appeal to this court. (192 App. Div. 563.)

It is unnecessary to state the facts which are sufficiently set forth for the purpose of this appeal in the opinion on the former appeal. We then held, in reliance upon the case of *Morgan v. Mutual Benefit Life Ins. Co.* (119 App. Div. 645; *affd.*, 189 N. Y. 447), that this court acquired jurisdiction over the defendant Sarah Schoenholz by publication of the summons, although she did not appear. Since that opinion was pronounced, the Court of Appeals has handed down a decision in the case of *Hanna v. Stedman* (230 N. Y. 326), reversing 185 Appellate Division, 491, holding that service of the summons by publication upon a non-resident defendant does not confer jurisdiction over such defendant in an action brought for the purpose of determining conflicting claims to

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moneys payable under membership certificates issued by an unincorporated fraternal beneficiary association under which it became bound upon the death of the member to pay the sum named in the certificate to the person designated as beneficiary under the rules and regulations of the association. The court held that such an action was not one *in rem*. The question in that case arose in an action of interpleader brought by the fraternal association for the purpose of determining the rights of various claimants to the moneys payable thereunder. In that action it appeared that one Ehrman was the holder of two certificates in each of which he named his wife as beneficiary. She predeceased her husband, who failed thereafter to make any other designation. Upon his death conflicting claims were presented to the moneys payable under the certificates by the representatives of the respective estates of Ehrman and his wife, and by other persons, including a son, all of whom excepting the son were non-residents of the State of New York. Service upon the representatives of Mrs. Ehrman's estate was made by publication without the State, but the parties so attempted to be served never appeared in the action. Judgment was finally rendered in favor of the son, who directed the moneys payable under the certificates to be paid to the representatives of Mr. Ehrman's estate, which was accordingly done.

In the course of its opinion the court stated: "While perhaps it would be difficult to describe all the superficial features which might be possessed by different actions and proceedings *in rem* and *quasi in rem*, it seems perfectly obvious that the action which we have described did not have any of the substantial and indispensable characteristics of such an action as they have been defined again and again. An action or proceeding *in rem* has for its subject specific property which is within the jurisdiction and control of the court to which application for relief is made. The action proceeds against such specific property and its object is to have the court define the rights therein of various and conflicting claimants. Jurisdictional control of the property affords the basis for service beyond its jurisdiction upon those who may be interested in its disposition. The result of such an action is a judgment which operates upon the property and which has no element of

personal claim or personal liability. There is no authority so far as we are aware holding that an action of interpleader is one *in rem*, but exactly the opposite view has been entertained. (*N. Y. Life Ins. Co. v. Dunlevy*, 241 U. S. 518, 521, 522.) A mere inspection of section 438 of the Code seems to make it so plain that the case was not one permitting service by publication under the provisions of that section on the ground that the action related to specific personal property, that we deem it unnecessary to discuss the proposition at length. It, however, seems to be thought and argued that even though it should be determined now that the action pending in the New York court was not one *in rem* which permitted jurisdiction of a non-resident party to be secured by service by publication, still the decision of that court that it was such an action was a binding adjudication which could not be escaped by the Maryland court. This of course is not so as to a fact necessary to confer jurisdiction. A court even of general powers cannot acquire jurisdiction merely by asserting it or determining that it exists. It cannot acquire jurisdiction of the person by asserting and finding his residence within the State when the undisputed facts conclusively show him to be a non-resident. And it cannot for the purpose of acquiring jurisdiction of a non-resident through service of the summons by publication assert and determine that the cause of action before it is of a character which permits jurisdiction by such service when the undisputed facts show conclusively that it is not such an one. The nature of the action in such a case is one of the jurisdictional facts and the court cannot determine in its favor the existence of jurisdiction when there is nothing to support such view. (*O'Donoghue v. Boies*, 159 N. Y. 87, 97-99; *Risley v. Phenix Bank of N. Y.*, 83 N. Y. 318, 337; *Pennoyer v. Neff*, 95 U. S. 714, 721; *Thompson v. Whitman*, 18 Wall. 457, 463, 469; *National Exch. Bank of Tiffin v. Wiley*, 195 U. S. 257; *Haddock v. Haddock*, 201 U. S. 562; *Reynolds v. Stockton*, 140 U. S. 254, 264, 265.)"

As already observed this court in deciding the former appeal in this case relied upon the case of *Morgan v. Mutual Benefit Life Ins. Co.* (119 App. Div. 645; *affd.*, 189 N. Y. 447) and held that that action was similar in principle to this. In the light of the opinion in the *Hanna* case, how-

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ever, it seems clear that the *Morgan Case* (*supra*) was not applicable to the facts in this case, inasmuch as in that case the action was brought for the purpose of impressing a lien upon the policy for the amount of premiums thereon, in order that plaintiff, as the actual assignee of the policy of insurance, might be reimbursed to the extent of the amount of money paid to keep the policy alive. In that case the policy was assigned by the insured as well as by the wife, who was the beneficiary therein named, so that title to the policy as such was firmly established in plaintiff. In the instant case there is an agreement to assign by the insured only, and although the plaintiff alleges that she paid the premiums after her marriage until the death of her husband, the action was not brought to recover the premiums paid upon the policy therefor, but for the recovery of the entire amount of the policy. Under these circumstances it seems to us that the facts in the instant case do not differ in principle from those appearing in the *Hanna Case* (*supra*).

It, therefore, follows that the judgment appealed from must be reversed upon the ground that the court never acquired jurisdiction over the defendant Schoenholz.

The judgment is reversed and a new trial ordered, with costs to the appellant to abide the event.

CLARKE, P. J., and DOWLING, J., concur; LAUGHLIN and MERRELL, JJ., dissent.

CLARKE, P. J. (concurring):

In *Hanna v. Stedman* (230 N. Y. 326) the fraternal beneficiary association had by special assessment collected and had in its possession the moneys required to be paid on its certificate. The Supreme Court of this State had expressly determined that it had jurisdiction of the non-resident claimants by service by publication and rendered judgment. In an action in Maryland the courts of that State held that the New York court had not obtained jurisdiction, and gave judgment for the Maryland claimants. Many years afterward — the association having paid the New York judgment — an action was brought here on the Maryland judgment, and the Court of Appeals decided as stated by Mr. Justice GREENBAUM.

It seems to me that there were presented facts establishing an action *in rem* far more persuasive than anything presented in the case at bar. Ordinarily we would be bound by our former decision. But it is our duty to follow as well as we can the law as laid down by the Court of Appeals, and in view of the emphatic rejection of the *in rem* theory in the *Hanna* case, I feel bound to accept its latest views and concur in the reversal of this judgment.

DOWLING and GREENBAUM, JJ., concur.

LAUGHLIN, J. (dissenting):

This is a suit in equity by the widow of Harry Schoenholz to have it declared that she is the equitable owner of a policy of insurance issued by the defendant on the life of her husband payable, in the event of his death before a date specified, to his sister, the defendant Sarah Schoenholz, who was designated the beneficiary, and to have the designation of the beneficiary named therein canceled and declared null and void, and to have it adjudged that the insurance company pay the proceeds of the policy to the plaintiff. The policy gave the decedent the right to change the beneficiary without her consent and to assign the policy, and contained provisions regulating a change of beneficiary and an assignment of the policy; but did not provide that compliance therewith should be a condition precedent to the validity of a change of beneficiary or of an assignment of the policy or that a change of beneficiary or an assignment without compliance therewith should be void. The insured died on the 24th of March, 1918, without having changed the beneficiary or having made a written assignment of the policy in the manner prescribed therein. The beneficiary designated in the policy was a resident of Austria and has been served by publication in the manner provided for such service by the Code of Civil Procedure, but she failed to appear. (See Code Civ. Proc. § 438 *et seq.*; *Id.* § 440, as amd. by Laws of 1918, chap. 309.) On a former trial of the issues the complaint was dismissed on the theory that this is not an action *in rem* and that the court did not acquire jurisdiction over the beneficiary. We held that it is an action *in rem* for an adjudication with respect to the

ownership of the policy which was within the jurisdiction of the court, and that the court acquired jurisdiction for that purpose over the beneficiary by service by publication, and that there was an equitable assignment and delivery of the policy to the plaintiff by the insured for a good and valuable consideration, namely, her agreement to marry him, and to pay the premiums, which she did, and the judgment was reversed and a new trial granted. (*Schoenholz v. New York Life Ins. Co.*, 192 App. Div. 563.) The evidence on the new trial is substantially the same as on the former trial; and the points now presented by the appellant are substantially the same as those presented on the former appeal, namely, that the court did not acquire jurisdiction over the beneficiary and that the assignment of the policy was invalid in that it was not made as therein provided. It is now proposed to overrule our former decision on the theory that it, in effect, has been overruled by *Hanna v. Stedman* (230 N. Y. 326). I am unable to agree with that view. In *Hanna v. Stedman* (*supra*) it was held that an action of interpleader brought by a beneficiary association, which had issued beneficiary certificates to a member payable on his death to a designated beneficiary who predeceased him, against conflicting claimants under the certificates, and to be relieved from liability by payment of the amount payable by it under the certificates as might be directed by the court, and to require the claimants to litigate between themselves their respective rights thereto, was not an action *in rem* or one affecting specific personal property within the provisions of subdivision 5 of section 438 of the Code of Civil Procedure, authorizing service on a non-resident defendant by publication. In that case the amount payable under the certificates had been collected from the members of the association, but had not been separately set apart or appropriated to the payment of the certificates; and the court held that the liability of the association was a mere personal liability to whoever might be entitled to collect of it the money, and that no right or title to or lien upon specific personal property was involved in the action of interpleader. The controlling principle enunciated by that decision is that to constitute an action one *in rem* there must be a prayer for



the determination of rights with respect to specific property within the jurisdiction of the court and the judgment therein must operate upon the property, and that an action of interpleader is not such an action, for the reason that the plaintiff therein makes no claim to the property or fund. Our decision on this point on the former appeal was predicated principally upon the decision in *Morgan v. Mutual Benefit Life Ins. Co.* (189 N. Y. 447), which the court in *Hanna v. Stedman* (*supra*) neither overruled nor deemed sufficiently in point to require that it be distinguished or even considered. I am of opinion that this case cannot be distinguished on principle from *Morgan v. Mutual Benefit Life Ins. Co.* (*supra*). There, as here, the action was brought against the insurance company and the beneficiaries under an insurance policy present and payable here; and the facts there differed from those here presented only in that there the plaintiff claimed only a part interest in the policy by way of an equitable lien upon it and upon the proceeds thereof, while here the plaintiff claims and has shown an equitable assignment of the entire policy and the right to the whole amount payable thereunder. The beneficiaries in that case, as here, were non-residents of the State, and it was there held that the policy to which the action related constituted specific personal property within the State within the purview of subdivision 5 of section 438 of the Code of Civil Procedure, authorizing service by publication, and that jurisdiction over the beneficiaries was obtained by such service. Said subdivision 5 of section 438 expressly authorizes such service where the action affects the title to specific personal property as well as where it relates to an *interest* therein or *lien* thereon. The defendant is a domestic corporation, and the policy was expressly made payable in this State, where it was issued and assigned to the plaintiff and where she and her husband resided and where it was in her possession when the action was commenced and when it was tried. The action was brought for a judgment affecting the ownership of the policy by divesting the beneficiary of any interest therein and vesting the title and ownership thereof in the plaintiff who holds it, and requiring payment thereof by the insurance company to her. This, therefore, is plainly as between the plaintiff and the beneficiary, an action *in rem*

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and one affecting the right and title to specific personal property. (*Morgan v. Mutual Benefit Life Ins. Co.*, *supra*; *Holmes v. Camp*, 219 N. Y. 359.)

I, therefore, vote for affirmance.

MERRELL, J., concurs.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

MAX MAAS and Others, as Executors, etc., of SARAH D. MAAS, Deceased, Appellants v. MOSES L. MALEVINSKY, Respondent.

First Department, May 27, 1921.

**Pleadings — answer — motion to strike out and to make definite and certain — denial of allegations except as specifically admitted — defenses containing denials — bills and notes — right to sue on original loan.**

In an action to recover a loan the plaintiff is entitled to have the defendant's answer made definite and certain where it denies "each and every allegation set forth and contained" in certain numbered paragraphs of the complaint, "except as hereinafter specifically admitted," for although there are apparently explicit denials, a loophole is left open in qualifying them with the exception as to alleged specific admissions, which are difficult of ascertainment.

The separate defenses, in each of which there is a reaffirmation of prior allegations of the answer containing denials, are improper since plaintiffs would not be in a position to contest the sufficiency of any of the defenses upon motion.

A lender of money may sue upon the original loan or upon the note if one is given, and, hence, defendant's second defense, which seems to be predicated upon the idea that if plaintiffs have any cause of action whatsoever it is upon a promissory note, is insufficient.

APPEAL by the plaintiffs, Max Maas and others, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 9th day of December, 1920, as resettled by an order entered in said clerk's office on the 2d day of March, 1921, as denies plaintiffs' motion to strike out

and to make definite and certain various allegations and matters set forth and recited in defendant's amended answer.

*Leon Lauterstein* of counsel [*Samuel A. Adamson* with him on the brief; *Wise & Seligsberg*, attorneys], for the appellants.

*M. L. Malevinsky* of counsel [*O'Brien, Malevinsky & Driscoll*, attorneys], for the respondent.

GREENBAUM, J.:

The complaint alleges in plain and concise words the making of a loan to defendant of \$9,000 by plaintiffs' testatrix, the defendant's mother-in-law, at his request between and during the years 1906 to 1909; a promise by defendant to repay; payment of \$1,500 during the lifetime of the testatrix on account; defendant's promise after her death to the plaintiffs, executors, to pay the balance of \$7,500 on or before May 1, 1920, and defendant's failure to pay any part of said balance excepting the sum of \$2,500.

Simple as is this complaint, the answer contains denials that are evasive in character and defenses couched in language which lacks clarity of meaning and gives a semblance of defenses, which upon close examination tend to lead to confusion and uncertainty as to what some of them really are. In the 2d paragraph of the answer the defendant denies "each and every allegation set forth and contained in paragraphs 3, 4, 5, 6, 7 and 8 of the complaint, except as hereinafter *specifically admitted.*" (Italics ours.)

Although there are apparently explicit denials a loophole is left open in qualifying them with the exception as to alleged specific admissions, which are difficult of ascertainment. The only direct admission appears in the "third" paragraph of the answer in which it is alleged that the "plaintiffs' testatrix loaned defendant the sum of \$9,000" prior to the year 1910, coupled, however, with a reference to a denial of indebtedness because of the acceptance by the testatrix of certain promissory notes of defendant, the details of which are not disclosed. In the "fourth" paragraph there is a jumble of statements concerning promissory notes, which tend further to confuse the issues.

The answer also contains three so-called separate defenses

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in each of which there is a reaffirmation of each of the criticised allegations in paragraphs 2, 3 and 4 of the answer. With such denials left in the answer, plaintiffs would not be in a position to contest the sufficiency of any of these defenses upon motion.

The first defense apparently seems to be based upon the theory that when the defendant executed his notes it was understood between him and his mother-in-law that he need not pay the note or notes when due, but at his "convenience and choice" and that he does not find it convenient at present to pay. The second defense seems to be predicated upon the idea that if plaintiffs have any cause of action whatsoever "it is upon a promissory note and not upon an open loan."

It seems to be well settled that a lender may sue upon the original loan or upon the note if one is given. (*Jagger Iron Co. v. Walker*, 76 N. Y. 521, 524; *St. Albans Beef Co. v. Aldridge*, 112 App. Div. 803, 806.)

The third defense is based upon the plea of usury. If defendant has any genuine defenses to the plaintiffs' claim there is no reason why he should not be obliged to state them in ordinary and concise language without repetition, as required by section 500 of the Code of Civil Procedure, and why he should not aver his denials in such clear and unequivocal language that "he who runs may read."

The order is reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs, with leave to the defendant to serve an amended answer upon the payment of taxable costs and disbursements to date.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ., concur.

Order so far as appealed from reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, with leave to defendant to serve amended answer on payment of taxable costs and disbursements to date.

ROTARY SHIRT CO., INC., Respondent, *v.* SAMUEL MELTZER,  
Appellant.

First Department, May 27, 1921.

**Sales — action to recover purchase price of goods delivered — defense that goods were rejected as not in accordance with sample — question for jury whether goods accepted or rejected within reasonable time.**

In an action to recover the purchase price of silk which the plaintiff sold and delivered to the defendant, in which the defense interposed was that the goods were rejected because they were not according to sample, evidence examined and *held*, that it was error for the court to direct a verdict in favor of the plaintiff; the case should have been submitted to the jury to determine whether the defendant accepted the goods or whether he rejected them within a reasonable time.

APPEAL by the defendant, Samuel Meltzer, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 5th day of November, 1920, upon the verdict of a jury rendered by direction of the court after a trial at the New York Trial Term.

*Maurice J. Katz* of counsel [*Katz & Levy*, attorneys], for the appellant.

*Louis H. Levin* of counsel [*Steinberg & Levin*, attorneys], for the respondent.

GREENBAUM, J.:

The action was brought to recover the purchase price of twenty-seven pieces of silk goods, pursuant to an oral contract made sometime in January, 1920. It is undisputed that the goods were duly delivered by the plaintiff to the defendant; that they were not accepted by the defendant upon the alleged ground that they were not in accordance with the samples upon which the sale was made; that it was thereupon agreed between the parties that the defendant retain six of the pieces which were satisfactory to him and that in lieu of the rejected twenty-one pieces he would accept twenty-one

pieces of "first quality" silk corresponding to a sample, which differed from the goods originally purchased, and for which he would pay an increased price, to wit, three dollars per yard instead of two dollars and seventy-five cents. This superseding contract was entered into in the latter part of January. Subsequently the plaintiff delivered twenty-one pieces of silk. The parties differ as to the date of delivery. Defendant positively states that they were delivered on March tenth or eleventh. The invoice or bill for this shipment is dated March eleventh.

On the other hand, the defendant signed a receipt for the goods dated February twentieth. The plaintiff's president, a Mr. Liberman, however, admitted that it was the practice in his business to make out receipts some days in advance of the actual delivery and that he did not know when they were in fact delivered.

Defendant testified that on March fifteenth he telephoned to Mr. Liberman and informed him that he had examined the goods and found that they were not "first quality" as agreed upon, but "seconds" and contained many misweaves and that he could not use them and that Liberman thereupon said: "'What do you intend to do with those goods if they are seconds?' I said, 'You know well enough I cannot use them; I am going to send them back,'" and that thereupon Liberman stated: "I will come down to see you."

Liberman denied that any such conversation took place.

On April eighth defendant wrote to plaintiff to have a "representative call to see our Mr. Meltzer in reference to the silks we bought from you," to which the plaintiff replied under date of April tenth: "Would kindly ask you to let us know by mail for what reason you desire to see our representative. We tried to get you on the wire yesterday, but you were not in. We left word for you to call us and have not heard from you yet." To this letter defendant wrote a reply under date of April twelfth: "We are in receipt of your letter of April tenth and cannot understand why it is so hard for your representative to come to see us without knowing the reason why. We wish to see him in reference to the goods we bought from you, and when he comes we will give him all the explanations."

It is contended in behalf of the plaintiff that the foregoing communications of the defendant making no mention of the fact that the goods were not in accordance with the sample, conclusively established that no conversation over the telephone such as testified to by the defendant ever took place.

It is, however, admitted that on the fourteenth or fifteenth of April Liberman called at defendant's place of business and had a conversation with the latter. Plaintiff's version of that interview is as follows: "I said to Mr. Meltzer, I says: 'What did you want to see me about? You wrote two letters to me that you want to see me.' He also called me up that he wants to see me. So when I got there, I said: 'What do you wish to see me about?' He said: 'I will tell you, Liberman, I am stuck with the goods that I bought from you.' He says: 'We make overalls and working shirts only, we have never made silk shirts since we are in business,' or, 'we haven't made any,' or something like that, and he said, 'and we don't know how to make silk shirts,' and to prove to me that he don't know how to make them, he had a few pieces which he has bought from us, goods of a different character; these were 32 inches in question and the ones he had from us was 40 inch goods, he had it made up and they were made up terrible. He said: 'Not only will I lose my money on the goods, but,' he said, 'it will also cost me the making and expense.' He says: 'Can you help me out and have those silks to be made up into shirts and make the shirts for me?' I looked at his make and saw that he don't know how to make the silk shirts. I said: 'I should be very glad to do that, Mr. Meltzer,' I says, 'and furthermore, I don't want any profit on the making of the shirt.' I says, 'Whatever the extra cost for pattern, making, buttons and trimmings which I believe will amount to between eleven or twelve dollars a dozen,' I says, 'that is all I will charge you for it and I will send the shirts back to you as soon as I get a chance to make them for you.'"

Defendant's version of the conversation is that he complained that the goods "run misweaved;" that he showed the goods to Liberman who said: "'That is the way they got to run.' I said, 'Well, they may run that way while you buy goods, but when I bought them, I bought them as firsts

and my cutter claims that he cannot cut them that the shirt should be perfect, because sometimes the pattern is put on where the misweaving or hole is and it will be not perfect shirts;” that thereupon Liberman said “‘Tell your cutter that he don’t know your business; he don’t know how to cut them.’ I said, ‘Do you know how to cut them better?’ He said, ‘Certainly, we are making these goods and we never have any seconds; may be one shirt out of a hundred comes out a second, you can avoid those misweaves and those mis-threads by cutting it.’ I said: ‘If you are a wonder, do it for me and give me perfect shirts.’ He says, ‘Certainly, I will do it for you with pleasure.’ He says: ‘I will make them up for you; I am going to give you shirts that will be perfect.’ I said, ‘If that is the case, I will give you the goods to make them up for me, but *I will not keep the goods unless you give me shirts that shall come out perfect.*’ [Italics ours.] He says: ‘All right, I will let you know when you can send over the goods and I will make up shirts for you.’”

On April fourteenth defendant wrote a letter to the plaintiff confirming the conversation as to manufacturing the shirts for him. Plaintiff replied to this letter under date of April sixteenth also confirming the arrangement, but adding: “We will notify you within due time when we will be in a position to make these for you, and at that time you may send in the goods, but at present we are quite busy, and we will not be in a position to undertake to make them for you, however, we may suggest to you to get in touch with the Shircraft Co., 718 Broadway, city, who we believe are in a better position to make them for you, and they probably will make them for a little less than we can. We recommend them very highly to you as reliable and honest good shirtmakers.”

On April nineteenth defendant wrote to plaintiff: “When you were up in our place, you faithfully promised to make up for us shirts from the silk we bought from you. We also explained to you that we have no use for this material otherwise. We would like to send these goods over to you, and, therefore, would like to get an acknowledgment that we should ship these goods to you,” to which plaintiff answered under date of April twenty-second:



" My DEAR Mr. MELTZER:

" I have received your letter of April 19th, and I again repeat that I will be only too glad to make those shirts for you, of the materials you mentioned to me, but at the present time we are cutting 36 inch and 40 inch goods, and as soon as we will make a 32 inch cut I shall let you know, and at that time make up the shirts for you as stated in our previous letter. With kind regards, I am,

" Yours very truly,

" MEYER LIBERMAN."

It thus appears that although the parties differ as to what was said respecting the reason why the goods were to be returned to plaintiff to be manufactured into perfect shirts, as matter of fact, it was agreed between them that the plaintiff would manufacture the shirts and would notify the defendant when it would be prepared to receive the goods.

Defendant further testified that in addition to writing, he also telephoned to Liberman about sending the goods, but that he heard nothing about the matter until the twenty-seventh day of May when a representative of plaintiff came to his office and asked him for a check for the goods; that he told him that he would not pay for the goods until the shirts were made up as agreed, and that he then showed this representative misweaves in the goods and that he thereupon returned the goods to the plaintiff.

Defendant produced a witness by the name of Montgomery, who was an examiner of dry goods with an experience of forty years, and who was called to testify as to the quality and grade of the silk in dispute. This witness was not permitted to testify upon the ground that the evidence established that there had been an acceptance of the goods by the defendant. Defendant duly excepted to the court's ruling. Thereafter the court directed the jury to find a verdict in favor of the plaintiff in the sum of \$6,006.20.

It seems to us that the testimony in the case clearly indicates marked differences between the parties as to whether the defendant had accepted the goods or whether they had been rejected within a reasonable time and that the case should have been submitted to the jury to determine: (1) As to

when the twenty-one pieces of silk were delivered to defendant. (2) Whether the defendant notified the plaintiff within four or five days after the goods were delivered that they were not in accordance with sample. (3) As to what the conversation between the parties, admittedly held on April fourteenth, was and whether the admitted agreement on the part of the plaintiff to manufacture shirts for the defendant from the goods in question was based upon defendant's claim that the goods were not in accordance with sample or whether it was entered into because of defendant's claim that he was not familiar with the manufacture of silk shirts. (4) Whether or not the goods delivered were in accordance with the sample agreed upon. (5) Whether the defendant was justified in returning the goods when he did and whether the defendant's rejection of the silk was made within a reasonable time.

In our opinion the learned trial court erred in excluding the testimony of Montgomery and in directing a verdict. The judgment and order appealed from are reversed, with costs to appellant to abide the event, and a new trial is ordered.

CLARKE, P. J., DOWLING, PAGE and MERRELL, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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CHARLES GRAY MANDEVILLE, Respondent, v. THE COLLEGE OF THE CITY OF NEW YORK, Appellant.

First Department, May 27, 1921.

**Municipal corporations — civil service — action by suspended employee to recover wages during period of suspension — employee working on per diem basis suspended pending determination of criminal charges not entitled to pay during suspension — Greater New York Charter, § 1569-a, not applicable.**

A stationary engineer employed by the city of New York on a *per diem* basis is not entitled to recover his wages during the period of his suspension without pay pending the outcome of criminal charges preferred against him on which he was tried and acquitted and thereafter restored to duty.

Under section 1569-a of the Greater New York charter, which grants power to suspend an employee without pay "pending the hearing and determi-

nation of charges against him or the making of any explanation, as the case may be," the "charges" referred to are those which are to be heard and determined under the rules of the department in which the person is employed and not criminal charges pending in court, and, hence, the provision of said section that a suspended employee shall be entitled to full compensation from the date of suspension to the date of reinstatement, is not applicable.

APPEAL by the defendant, The College of the City of New York, from a determination of the Appellate Term of the Supreme Court, First Department, entered in the office of the clerk of said Appellate Term on or about the 10th day of February, 1921, affirming a judgment of the Municipal Court of the City of New York, Borough of Manhattan, Seventh District, in favor of the plaintiff.

*Elliot S. Benedict* of counsel [*John F. O'Brien* with him on the brief; *John P. O'Brien*, Corporation Counsel, attorney], for the appellant.

*Dean Nelson*, for the respondent.

GREENBAUM, J.:

Plaintiff, an honorably discharged veteran of the Spanish War, was employed as a stationary engineer at the College of the City of New York. He had originally been appointed in 1906 an engineer in the street cleaning department after a competitive examination. He was transferred in 1908 to the College of the City of New York. On the 13th day of January, 1920, he received a letter from the defendant's president which reads as follows: "You are hereby suspended without pay, pending the outcome of the charges preferred against you." The charges referred to were not disciplinary proceedings upon which a hearing was pending before the college authorities, but were criminal charges at Special Sessions on which he was tried and acquitted. Upon his acquittal he was restored to duty on the 29th of March, 1920. The suspension continued for a period of seventy-five days. At the time of his suspension the plaintiff's wages were at the rate of six dollars per day.

It appears that plaintiff and others, rendering similar services for the college were paid only for the time when they worked. The defendant sets up in its answer as a partial

defense the receipt of certain moneys earned by plaintiff while under suspension; another partial defense that during plaintiff's suspension the defendant paid at the rate of six dollars *per diem* to other stationary engineers for the performance of the duties which would have devolved upon the plaintiff under his appointment, and as a complete defense that by the terms of his employment plaintiff was only to be paid for the time he actually worked.

The facts are not in dispute. Plaintiff contends that under section 1569-a of the Greater New York charter he was entitled to full compensation during the period of his suspension in view of the dismissal of the charges against him at Special Sessions. The Municipal Court justice gave judgment for the plaintiff for the full amount claimed less the sum of forty-five dollars earned by him in outside employment during the time of his suspension. The Appellate Term affirmed the judgment of the court below without opinion.

Section 1569-a of the Greater New York charter reads as follows: "Except as otherwise specially provided the head of a city department or any other officer, board or body of the city, or of a borough or county within the city, vested with the power of appointment and employment, in addition to existing powers, may, in his discretion, suspend, for not more than one month without pay, any officer or employee of his department, board, body or office, pending the hearing and determination of charges against him or the making of any explanation, as the case may be. If the person so suspended be removed, he shall not be entitled to salary or compensation after suspension. If he be not so removed, he shall be entitled to full salary or compensation from the date of suspension to the date of reinstatement, less such deduction or fine as may be imposed." (Laws of 1901, chap. 466, § 1569-a, as added by Laws of 1913, chap. 694.)

There can be no doubt that this section applies to an employee as well as to an officer. The suspension provided for in that section was not to exceed a month without pay and the power of suspension could only be exercised "pending the hearing and determination of charges against him or the making of any explanation, as the case may be," meaning "charges" to be heard and determined under the rules of

the department in which he was employed and not to criminal charges pending in a court.

The plaintiff was not suspended under section 1569-a (*supra*) and hence the provisions of that section are not available to him. Plaintiff was carried on the permanent payrolls of the College of the City of New York and was regarded as a regular employee. There is no doubt that plaintiff could only be removed in the manner provided by section 1543 of the Greater New York charter and section 22 of the Civil Service Law (as amd. by Laws of 1910, chap. 264).<sup>\*</sup> The fact, however, is that he was a *per diem* employee and that he was not removed, but merely suspended. The law applicable to this case was considered in *Sutcliffe v. City of New York* (132 App. Div. 831) and in the authorities therein cited.

In the *Sutcliffe Case* (*supra*) the court divided the public officials and employees into three classes and formulated the rules recognized by the courts in determining when they are entitled to recover their salaries or moneys in cases of reinstatement.

The court stated, referring to the second class, which embraced clerks and subordinates of a grade higher than those in the third class: "To these positions in the exercise of public policy is attached the principle that the city will not be obliged to pay twice for the same service."

As to the third class, under which plaintiff would come, the court said: "*Third.* That there is a class of employees in minor positions whose pay does depend upon work performed, and who cannot, therefore, recover unless for services actually rendered." (*Terhune v. Mayor, etc.*, 88 N. Y. 247; *Higgins v. Mayor, etc.*, 131 id. 128; *Cook v. Mayor*, 9 Misc. Rep. 338; *affd.*, 150 N. Y. 578.)

The principle of "no work, no pay" in regard to *per diem* employees has been recognized in many other cases. (*Cook v. Mayor, supra*; *Cottam v. City of New York*, 74 Misc. Rep. 67; *Doyle v. City of New York*, 132 N. Y. Supp. 774; *O'Donnell v. City of New York*, 128 App. Div. 186; *Walsh v. City of New York*, 143 id. 150.)

The determination appealed from and the judgment of the

<sup>\*</sup> Since amd. by Laws of 1920, chap. 833.—[REp.]

App. Div. 111]

First Department, May, 1921.

Municipal Court are reversed, with costs to appellant in this court and in the Appellate Term, and the complaint dismissed, with costs.

CLARKE, P. J., DOWLING, PAGE and MERRELL, JJ., concur.

Determination and judgment reversed, with costs to appellant in this court and in the Appellate Term, and the complaint dismissed, with costs.

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ALBERT HAESSIG, Appellant, v. DURELL GREGORY and Others,  
Respondents.

First Department, May 27, 1921.

**Fraud and deceit — action at law to recover damages based on fraudulent representations by defendants inducing purchase of corporate stock — plaintiff entitled to rescission of contract — proof of damage not required — amount paid recoverable.**

In an action at law to recover the amount paid by the plaintiff to the defendants for certain oil stock, on the ground that the sale was induced by the false and fraudulent representations of the defendants which the plaintiff relied on in making the purchase and in paying money therefor, in which the plaintiff alleged that upon the discovery of the fraud he demanded the return to him of the money paid and offered to return the certificates of stock and to repay certain sums paid to him as purported dividends, and that the defendants refused to accept the return of the stock and failed to comply with plaintiff's demand, and that by reason of said facts the plaintiff was "damaged" in the sum for which judgment was demanded which was the amount he paid for the stock, it was error for the court to dismiss the complaint on the ground that the plaintiff failed to prove the difference between what the stock was worth at the time of its purchase and what it would have been worth if the alleged representations had been true.

The fact that the plaintiff alleged that he was "damaged" did not require him to prove damages as a consequence of the alleged fraud or deceit, for the whole scheme of the complaint shows that it was brought for the purpose of recovering as damages the money paid by the plaintiff, and under the circumstances alleged the plaintiff was entitled to a rescission of the contract and to a recovery of the consideration paid.

APPEAL by the plaintiff, Albert Haessig, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 6th day

of April, 1921, upon the dismissal of the complaint by direction of the court at the close of the plaintiff's case, and also from an order entered in said clerk's office on the 29th day of March, 1921, denying plaintiff's motion to set aside the dismissal and to go to the jury on certain questions of fact upon the proofs submitted at the trial.

*Benjamin Jaffe* of counsel [*Mervyn Wolff*, attorney], for the appellant.

*Philip C. Samuels* [*Max Lazarus* with him on the brief], for the respondents.

GREENBAUM, J.:

Plaintiff brought this action on the law side of the court to recover the sum of \$7,125 paid by him to the defendants for certain oil stock of a company known as the Interstate Petroleum Company, in reliance upon the fraudulent representations of the defendants. These representations were alleged to be that the defendants were financially interested in the said company and "that the said Interstate Petroleum Company owned, free and clear of all encumbrances, hundreds of acres of oil and gas lands in the State of Kentucky and elsewhere; that at least a dozen wells had been actually drilled in the said oil and gas lands owned by the said Interstate Petroleum Company; and that said wells were actually producing oil in large quantities, which were netting the corporation large sums of money, sufficient to warrant the corporation in giving its stockholders monthly dividends of at least one per cent; that the said oil wells were in fact connected with pipe lines, and were thus rendered extremely valuable; and that the stock of the said Interstate Petroleum Company was valuable stock and was listed in the curb market."

The complaint further alleged the falsity in their entirety of all the representations above set forth; that defendants knew them to be false when made; that plaintiff relied upon such representations in making the purchase and in paying the moneys therefor; that upon the discovery of the fraud he demanded the return to him of the sum of \$7,125, which he had paid for the stock and duly offered to return the certificates of the stock to the defendants and to repay the sum which plaintiff had received as purported dividends on the stock,

but which were in fact not dividends; that defendants refused to accept a return of the certificates and so-called dividends and failed to comply with plaintiff's demand and that by reason of the foregoing facts plaintiff was "damaged" in the sum of \$7,125, the amount paid by him for the stock.

Upon the trial of the action the plaintiff established all of the allegations of his complaint, and upon the close of his case the defendants moved for a dismissal upon the ground that the plaintiff failed to prove the "difference between what the stock was worth at the time of the purchase and what it would have been worth if the alleged representation were true." The court thereupon dismissed the complaint, to which due exception was taken.

The respondents rely upon the proposition that because the complaint alleged that the plaintiff was "damaged" by reason of the allegations therein in the sum of \$7,125, that necessarily meant unliquidated damages, and that the plaintiff having failed to prove damages as a consequence of the alleged fraud or deceit, there can be no recovery. The scheme of the complaint clearly shows that it was brought for the purpose of recovering as damages the moneys paid by the plaintiff, induced by the fraudulent representations of the defendants.

The proofs most conclusively establish that the fraudulent representations were of such a character that the stock was practically worthless and that the damages suffered by the plaintiff were very considerable. Plaintiff, therefore, was entitled to a rescission of the contract.

It is only necessary to cite *Vail v. Reynolds* (118 N. Y. 297) and *Heckscher v. Edenborn* (203 id. 210) in support of the rule that one who has been induced by fraudulent representations to purchase property "may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract."

The judgment and order appealed from are reversed and a new trial ordered, with costs to the appellant to abide the event.

CLARKE, P. J., DOWLING, PAGE and MERRELL, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.



## ROY J. POMEROY, Respondent, v. NEW YORK HIPPODROME CORPORATION, Appellant.

First Department, May 27, 1921.

**Patents — action to recover royalties — agreement made before patent issued — patent denied in part on ground of conflict with existing patent — no consideration for agreement because plaintiff had no power to grant exclusive license — defendant not liable where no use made of device.**

In an action to recover royalties alleged to be due under a license to defendant for the exhibition of a stage device of which the plaintiff claimed to be the inventor and owner, it appeared that the agreement was executed after the plaintiff had applied for letters patent; that subsequent thereto and before the defendant made any use of said device it was learned that plaintiff's device would be an infringement upon an existing patent; that thereafter a patent was issued to the plaintiff which amounted in effect to an improvement upon said existing invention, and that the defendant attempted to use said device but found it impracticable.

*Held*, that the plaintiff was not entitled to recover, for at the time the contract was executed he had no power to grant an exclusive license for the production and use of said device and there was, therefore, no consideration for the contract.

SMITH, J., dissents, with memorandum.

APPEAL by the defendant, New York Hippodrome Corporation, from an order and determination of the Appellate Term of the Supreme Court, First Department, entered in the office of the clerk of the county of New York on the 15th day of November, 1920, affirming a judgment of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, in favor of the plaintiff, and the order denying defendant's motion to set aside the judgment and for a new trial made upon the minutes.

*Nathan Burkan*, for the appellant.

*John H. Jackson* of counsel [*Harris E. Skinner*, attorney], for the respondent.

GREENBAUM, J.:

The action was brought to recover royalties alleged to be due for the first five weeks commencing on or about September 1, 1919, under a license to defendant for the exhibition of a

stage device known as a "Bubble Illusion," of which the plaintiff claimed to be the inventor and owner.

The agreement was in writing dated May 16, 1919. It first recites the following preambles:

"WHEREAS *the inventor is the owner of* [Italics ours] a certain Bubble Illusion upon which he has heretofore applied for Letters Patent in the Patent Office of the United States of America; and WHEREAS the producer desires to secure the exclusive license to manufacture and use the same as part of a theatrical production to be produced in the New York Hippodrome on or about September 1, 1919."

It then provides that the parties agree as follows:

"*First.* The said inventor hereby grants to the said producer an exclusive license to manufacture and to use the said Bubble Illusion as part of a theatrical production upon the stage of the New York Hippodrome and for no other purpose for a period beginning with the date of this agreement and extending until the completion of the run of the production to be opened in the said theatre on or about the first day of September, 1919.

"*Second.* The said producer hereby promises and agrees to pay to the said inventor beginning September 1, 1919, and continuing until the completion of the run of the said production, as royalty for the rights and licenses herein granted the sum of \$50 weekly payable weekly for each and every week during the said term provided the said Bubble Illusion when constructed proves to be satisfactory to the management of the New York Hippodrome on or before September 1st, 1919."

The complaint alleges the making of the agreement, the construction of the device, its acceptance by the defendant as satisfactory prior to September 1, 1919, and the due performance of the agreement by the plaintiff. The answer sets up certain denials and three defenses which may be summarized as (1) a failure of consideration and false representations in stating that the plaintiff was the inventor and owner of the device and of the exclusive right to make, copy, use and vend such device and that it was a patentable invention, whereas in fact plaintiff had no right to grant a license owing to the grant of a prior patent to one Hanlon, which embodied the

basic features of the device in question; (2) that defendant repudiated and rescinded the license agreement and discontinued its use, and (3) that the device was not workable and was unsatisfactory.

Upon the oral argument before us plaintiff's counsel conceded that the device which was the subject-matter of this controversy was an infringement upon the Hanlon patent and that the patent finally issued to the plaintiff amounted in effect to an improvement upon the Hanlon invention.

It follows from the concession that plaintiff was not entitled to any recovery. It appears without contradiction that Morange, the owner of the Hanlon patent, notified the defendant that the use of the plaintiff's device would be an infringement upon the Hanlon patent. After this notice the defendant informed plaintiff that it would discontinue using the apparatus unless plaintiff adjusted the matter with Morange. No adjustment, however, was effected.

The proofs are that when the parties entered into the agreement, proceedings were pending in the United States Patent Office upon the application of the plaintiff dated April 30, 1919, for a patent covering all the features of the "Bubble Illusion" as they were represented to the defendant; that the claims of the plaintiff were subsequently disallowed, so far as they covered certain elements, which were embodied in the Hanlon patent, and that on March 9, 1920, a patent was finally allowed to the plaintiff to the limited extent of what may be deemed certain so-called improvements upon the prior Hanlon patent.

So far as the record before us discloses, the plaintiff did not intend to defraud the defendant in the representations made to the defendant, since the plaintiff evidently believed that he was the inventor of all the features of his "Bubble Illusion" and expected to receive a patent which would confer upon him the exclusive right to the use of the "Bubble Illusion" in its entirety, as described to defendant.

This action was commenced on October 10, 1919. At that time the Patent Commissioner had not yet taken final action upon plaintiff's application. On March 9, 1920, the patent was granted to the limited extent heretofore mentioned and on April 23, 1920, this case went to trial. The plaintiff

admitted upon his cross-examination that before the Patent Office had acted on his application, and hence before the license was granted to defendant, he knew nothing of the Morange patent.

On behalf of defendant, its general stage director, one Robert H. Burnside, through whom the negotiations culminating in the license were had, testified that plaintiff came to his office to interest defendant in the "Bubble Illusion;" that he asked the plaintiff whether it was different from other illusions of which he had heard, specifying one at the Ziegfeld Follies and another at the Greenwich Village and the plaintiff said: "It was a totally different thing." This witness also testified that although he had heard of the Hanlon device, he had never in his life seen the patent and that he did not know that plaintiff's contrivance infringed upon the Hanlon patent, until Morange spoke to him about the matter some time after the agreement for the license had been executed.

The proofs show that defendant spent a considerable sum of money in constructing the mechanism in order that it might be ready for production by September first; that notwithstanding that it was built in accordance with the drawings and specifications received from the plaintiff and in conjunction and collaboration with him, it was impossible to produce one that was both workable and safe and that after several productions the witness declared it was found to be unsatisfactory to the defendant and besides "we didn't want to have any further trouble or law suit with Morange."

The written agreement on its face distinctly declares that plaintiff was the inventor and owner of the "Bubble Illusion." It purported to grant an "exclusive license" to defendant for its use during the season commencing about September first. All that the defendant was interested in was the "Bubble Illusion" as described by the plaintiff who expected to obtain letters patent therefor.

It transpired, however, that the plaintiff had no power to grant an exclusive license for the production of the "Bubble Illusion" which was the thing agreed upon. Defendant could not lawfully use the "Bubble Illusion" without securing a further license from the owner of the Hanlon patent. There was, therefore, no consideration for the contract, even if we

assume that the agreement was not procured by the fraud of the plaintiff.

In *Herzog v. Heyman* (151 N. Y. 590) the court said: "It is insisted, however, that all that the plaintiffs agreed to sell, or the defendants attempted to purchase, were the letters patent No. 367,212, irrespective of the fact whether they were valid or not. It was as the plaintiffs insist, an agreement to sell their right, if any, under the letters, the defendants assuming the risk of their validity. It would, of course, have been competent for the parties to have entered into an agreement of the character suggested, but very clear evidence of such an agreement should be found before permitting a contract for the sale of letters patent to be so construed. The parties, generally, contemplate a transfer by the vendor to the vendee of an exclusive right vested in the former. 'The thing to be assigned is not the mere parchment on which the grant is written; it is the monopoly which the grant confers; the right of property which it creates'" (citing *Gayler v. Wilder*, 10 How. [U. S.] 493).

*A fortiori* the rule above declared would apply in the case of a license of an alleged inventor, who when the license was granted had no patent covering the subject-matter of the license and to whom a patent for the device described was refused.

In *Bottlers Seal Co. v. Rainey* (225 N. Y. 369), referring to a contract under which one Horner was given the sole license and right to manufacture certain patented bottle caps, the court said (at p. 373): "But the promise to make such payments is not absolute. In legal contemplation, the enjoyment of the undisturbed use of the patent, not the mere execution of the grant, is the consideration for the royalties. The debt is not contracted until the consideration is furnished. [*Garrison v. Howe*, 17 N. Y. 458; *Whitney Arms Co. v. Barlow*, 68 N. Y. 34; *Gold v. Clyne*, 134 N. Y. 262.] If the right to make, use and sell the patent terminates meanwhile; if the licensor does not respect the right; if it had no right to transfer; then the duty to pay royalties ceases; the time for payment never arrives and the debt is not contracted." And in *Cross v. Huntly* (13 Wend. 385) we have an express declaration of the court involving a situation very much like that under con-

sideration, in which the court said (at p. 386): "From the evidence, there cannot be a doubt but that the patent in both respects is defective and void; it was conclusively shown that material parts of the machine had been in use previous to the patent, and that the machine was worked upon the same principle as machines before in operation. *Secondly*. The patent purports on its face to be granted for 'a new and useful improvement in the washing machine,' and the schedule annexed, containing a specification of the improvement, gives a description of the entire machine, without distinguishing one part more than another as belonging to the patentee as the inventor. His patent is for the entire machine, for the principal parts of which, and the mode of operation, he clearly is not entitled to the credit of profit arising from the discovery. It is said in *Evans v. Eaton*, 7 Wheaton, 356, that a party cannot entitle himself to a patent for more than his own invention; and if the patent be for the whole of the machine, he can maintain a title to it only by establishing that it is substantially new in its structure and mode of operation. See 1 Peters, 322, 3 Wash. C. C. R. 443.\* A patent for an improvement should describe the machine in use, that it may be known in what the improvement consists. 1 Paine, 441.\* In *Brunton v. Hawkes*, 6 Com. Law R. 593, a patent for improvements in the construction of ships' anchors, windlasses and chaincables was held void, because there was no novelty in the construction of the anchors. The patent being void, nothing passed to the plaintiff in error, and the note was given without consideration."

Plaintiff relies upon an isolated quotation from *Martin v. New Trinidad Lake Asphalt Co., Ltd.*, No. 3 (182 App. Div. 719), PAGE, J., writing: "The seventh defense is predicated upon the alleged invalidity of the patent, but a licensor cannot as a defense to the payment of royalties attack the validity of the patent any more than a tenant can defend an action for rent on the ground that the landlord's title is defective."

It will be noted in that case that the action was brought to recover royalties which had accrued under a license upon user. In this case aside from a few unsuccessful attempts

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\* See *Evans v. Eaton* (1 Pet. C. Ct. 322; 3 Wash. C. C. 443); *Sullivan v. Redfield* (1 Paine, 441).—[REP.]

to produce a satisfactory working of the device there was no user and besides the defendant distinctly stated that it would not use it unless the plaintiff could settle the question of infringement with Morange, a condition that was reasonable in view of the subsequent disallowance of the vital claims in plaintiff's application to the Patent Commissioner.

The legal position of the parties is set forth in *Marston v. Swett* (82 N. Y. 526), in which the plaintiff granted an exclusive license to the defendants under a patent for which the defendants agreed to pay royalties. The court there stated: "We think the true rule to be deduced from the authorities is this: Where the patent is apparently valid and in force the party using it, receiving the benefit of its supposed validity, is liable for royalties agreed to be paid and cannot set up as a defense the actual invalidity of the patent. The reasons for the rule are that the party has got what he bargained for; that he cannot be allowed at the same time to affirm and disaffirm the patent; and that he cannot in this way force the patentee into a defense of his right and compel him to try it in a collateral action. While the manufacture goes on under such an apparently valid patent it is presumed to be under and in accordance with the agreement to pay royalties. If the manufacturer does not so intend, and chooses to make the patented article, not under the patent but in hostility to it, he must give notice of that intention, in order that the presumption may not attach or the patentee be misled. *But if the patent is annulled or destroyed by due and effective legal proceedings and priority of invention and a patent is awarded to another, no notice is necessary for there is no presumption or inference of manufacture under a patent judicially avoided and annulled. It ceases to exist.* [Italics ours.] The manufacture is either absolutely free, or an infringement upon the rights of the prior inventor, or in submission to his claims."

The determination appealed from and the judgment of the Municipal Court are reversed, with costs in this court and in the Appellate Term, and the complaint dismissed, with costs.

CLARKE, P. J., DOWLING and PAGE, JJ., concur; SMITH, J., dissents.

SMITH, J. (dissenting):

The license was confessedly valid to give to the defendant the right to use the improvements for which letters patent were given to the plaintiff. This right thus secured to the defendant has never been renounced by the defendant. The defendant itself may procure a license from the original patentee of the main device and still use these improvements without payment therefor, if this decision be right. As I read the evidence the defendant had full knowledge before the making of this contract, not only of the existence of the Hanlon patent, but also of its scope, and the contract must be read in view of that fact. I, therefore, dissent.

Determination and judgment reversed, with costs and disbursements in this court and in the Appellate Term, and the complaint dismissed, with costs.

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MORTIMER B. FOSTER, Appellant, v. N. W. HALSEY & COMPANY, Respondent.

First Department, May 27, 1921.

**Costs — taxation under Code Civil Procedure, § 3251, subd. 4, when cause on Appellate Division calendar more than one term — expenditure for corrections in printing appeal papers allowable — costs on appeal from order denying retaxation.**

Where a cause has appeared on the Appellate Division calendar for three terms, exclusive of the term at which the appeal was argued, the plaintiff is entitled, under subdivision 4 of section 3251 of the Code of Civil Procedure, to tax costs at thirty dollars for the three terms.

In the absence of any criticism as to good faith in the expenditure of money for corrections in printing the papers on appeal, the items should be allowed.

It is not error on an appeal from an order denying the retaxation of costs to allow costs to be taxed on such appeal even though the motion was not actively opposed at Special Term and no opposing affidavits or memoranda were submitted, but the appearance was made solely for the purpose of obtaining a ruling as to whether the items in question were properly taxable as costs.



APPEAL by the plaintiff, Mortimer B. Foster, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 11th day of February, 1921, denying plaintiff's motion for a retaxation of costs.

*Edward H. Neary* of counsel [*Edwards & Bryan*, attorneys], for the appellant.

*John N. Regan* of counsel [*Shearman & Sterling*, attorneys], for the respondent.

GREENBAUM, J.:

Plaintiff appeals from an order denying his motion for retaxation of a bill of costs and affirming the ruling of the clerk in striking therefrom thirty dollars for three term fees in the Appellate Division and eight dollars for additional expenses in printing the papers on appeal.

Section 3251, subdivision 4, of the Code of Civil Procedure provides: "For each term of the Appellate Division, not exceeding five, of the Supreme Court, at which the cause is necessarily on the calendar, excluding the term at which it is argued, or otherwise finally disposed of; ten dollars."

The Judiciary Law (§ 78) provides: "The terms of the Appellate Divisions of the Supreme Court are to be appointed by the Appellate Division in each department, and are to be held at such times and places and shall continue so long as the Appellate Division deems proper. The justices of the Appellate Division in the First Department shall fix a time and place for holding the terms of the Appellate Division in the First Department on or before the first day of December in each year."

On or about November 19, 1919, this Appellate Division made its appointment of terms for the year 1920 as follows:

"APPELLATE DIVISION OF THE SUPREME COURT APPOINTMENT  
OF TERMS OF THE APPELLATE DIVISION OF THE SUPREME  
COURT IN THE FIRST DEPARTMENT, 1920.

"The undersigned Justices of the Appellate Division of the Supreme Court in the First Department, pursuant to the provisions of Section 78 of the Judiciary Law \* \* \* do

App. Div. 121]

First Department, May, 1921.

hereby appoint NINE TERMS of the said Appellate Division to be held at the Court House of the Appellate Division in the County of New York, to commence respectively as follows: The first Tuesday of January, the first Tuesday of February, the first Tuesday of March, the fifth Tuesday of March, the fourth Tuesday of April, the fourth Tuesday of May, the first Tuesday of October, the first Tuesday of November and the fifth Tuesday of November, 1920 \* \* \*."

It is undisputed that this case was on the Appellate Division calendar for three terms, exclusive of the term at which the appeal was argued. A mere statement of the foregoing facts, therefore, indicates that the clerk improperly struck from the bill of costs submitted in behalf of the plaintiff the item of thirty dollars for three term fees. In the absence of any criticism as to the good faith of the expenditure of eight dollars for corrections in printing the papers on appeal, we think that this item also should have been allowed.

The learned counsel for the respondent present no argument whatever in support of the clerk's ruling and indeed practically concede that it was erroneous. They suggest, however, that no costs on this appeal be allowed because they did not actively oppose the motion for retaxation at Special Term and did not submit any opposing affidavits or memoranda, but that they merely stated to the court that they appeared solely for the purpose of obtaining a ruling as to whether the items in question were properly taxable as costs.

The order appealed from is reversed, with ten dollars costs and disbursements, and the motion granted.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion granted.

FRANK J. FOOTE, Appellant, v. WILLIAM A. GREENFIELD,  
Respondent.

Fourth Department, May 18, 1921.

**Contracts — performance — oral agreement for lease of wagons, title to pass upon payment of certain sum — plaintiff not estopped as matter of law by failure to read letter relating to agreement handed to him by defendant — erroneous refusal of trial court to submit to jury question as to effect of agreement between parties.**

Where the plaintiff leased wagons to the defendant under an oral agreement and the testimony of the parties was conflicting as to the sum which should be paid before title to the wagons should pass, the failure of the plaintiff to open and read a letter handed to him by the defendant when the wagons were inspected, it appearing that plaintiff had little time so to do, and relied on the defendant's promise that if the letter did not set forth the agreement properly, he would make it right, did not raise an estoppel, as a matter of law, binding the plaintiff by the terms of the letter, and, hence, it was error for the trial court to refuse to submit to the jury the question as to the effect of the agreement between the parties and to hold as a matter of law that the plaintiff could recover only a certain sum.

APPEAL by the plaintiff, Frank J. Foote, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Livingston on the 19th day of February, 1921, on the verdict of a jury, and also from an order entered in said clerk's office on the 9th day of February, 1921, denying plaintiff's motion for a new trial made upon the minutes.

*George R. Graves*, for the appellant.

*Harry L. Allen*, for the respondent.

PER CURIAM:

On September 28, 1918, the plaintiff and defendant entered into an oral agreement by which the plaintiff leased to the defendant twenty dump wagons for a rental of twelve dollars and fifty cents per month for each wagon. Defendant testified

that it was agreed that when ninety-five dollars rent was paid on each wagon, the title to the wagons was to vest in him. The plaintiff denied that and testified that the agreement was that if the United States government took over the wagons, then the option to vest the title when ninety-five dollars was paid became operative, otherwise not.

On September thirtieth the plaintiff and defendant met to inspect the wagons at a place near Buffalo and at that time the defendant handed to the plaintiff a letter purporting to state the agreement entered into between the parties, and stating it as the defendant claimed it to be upon the trial. The plaintiff testified that he said at that time, "I can't stop here and read this letter," and that the defendant said, "Get the wagons loaded and get them off and if there is anything in that letter that is not according to our understanding and our agreement, we will fix it up and make it right." The plaintiff testified that he put the letter in his pocket without reading it, that when he got home three or four days later and after the wagons had been shipped, he read the letter and discovered that it did not state the agreement as he testified that it was. He then wrote to the defendant calling his attention to that fact. The defendant upon the trial testified that in a later talk with the plaintiff it was agreed that the title to the wagons should vest when ninety dollars rental had been paid on each wagon.

The trial court submitted one question to the jury and that was whether the agreement was that the title should vest when ninety dollars was paid or ninety-five dollars on each wagon. The jury found that the agreement was that the title should vest when ninety-five dollars was paid and found a verdict in favor of the plaintiff for one hundred dollars and interest. The defendant had paid one thousand eight hundred dollars on account of the rentals before the commencement of the action. The plaintiff asked to have the question submitted to the jury as to what the real contract made between the parties was. That request was denied and the plaintiff excepted.

The defendant upon this appeal attempted to justify the ruling of the trial court upon the ground that the plaintiff, by shipping the wagons after he had put the letter referred to in

his pocket, was estopped and bound by the terms of the letter. The evidence of the plaintiff was that he put the letter in his pocket without reading it, relying upon the agreement of the defendant that if there was anything in the letter not according to the agreement, the defendant would fix it and make it right. Under those circumstances there was no estoppel as a matter of law. It was error for the trial court to refuse to submit to the jury the question as to what the agreement between the parties was and to hold as a matter of law that the plaintiff could recover only one hundred dollars and interest.

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide event.'

All concur.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

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JOHN W. SHEA, Appellant, v. MARGARET L. SHEA, Respondent.

Fourth Department, May 18, 1921.

**Trial — argument and conduct of counsel depriving plaintiff of fair and impartial trial and warranting granting of new trial — action on contract between plaintiff and defendant concerning probate of their brother's will — defense of fraud, duress and threats of criminal prosecution — evidence.**

Although there may be evidence sufficient to sustain a verdict in favor of either party, yet if there is such misconduct of counsel on the trial that plaintiff is deprived of a fair and impartial trial the verdict will be set aside and a new trial granted.

Hence, where an attorney brought an action against the defendant, who was his sister, to recover on a contract entered into between them concerning the probate of their brother's will, which agreement was later repudiated by the defendant, who alleged that the instrument was without consideration and was procured by fraud, duress, force and threats of criminal prosecution, and the attorneys on each side, but especially those representing the defendant, asked questions of the witnesses which tended to inflame the minds of the jury and prejudice them against the plaintiff, a new trial is properly awarded.

APPEAL by the plaintiff, John W. Shea, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Onondaga on the 12th day of December, 1919, upon the verdict of a jury, and also from an order entered in said clerk's office on the 31st day of October, 1919, denying plaintiff's motion for a new trial made upon the minutes.

*J. W. Shea*, for the appellant.

*Cregg Brothers & Rulison* [*Edward W. Cregg* of counsel], for the respondent.

CLARK, J.:

One James R. Shea, a resident of Baldwinsville, died suddenly of apoplexy on the evening of January 11, 1919. He was never married, his parents were dead, and his nearest relatives were two brothers and two sisters, the plaintiff and defendant being a brother and sister, respectively, of deceased. Mr. Shea left a will dated March 27, 1911, by the terms of which he left all his property of every kind to his sister, this defendant. She had resided with him and had been his housekeeper for upwards of thirty-five years. Shortly after the death of Mr. Shea, proceedings were begun in the Surrogate's Court of Onondaga county for the probate of said will and the brothers and sisters of deceased were served with the usual citations in such proceedings. A brother, Herbert J. Shea, filed objections to the probate of the will, but no objections were filed by plaintiff. The contestant demanded a jury trial and the case was adjourned to April 7, 1919. Along the latter part of March defendant was informed that plaintiff, who is a lawyer residing in Syracuse, was doing more or less talking about the sudden death of James R. Shea and she was advised to see plaintiff and have a talk with him. Accordingly defendant and her sister went to see plaintiff on two occasions and had interviews with him, and following them an instrument in writing was made April 2, 1919, signed by these parties, by the terms of which plaintiff agreed to allow said will, then before the surrogate for probate, to be probated without resistance on his part, and to assist in such probate and assist defendant

in other matters growing out of the settlement of the estate of James R. Shea, deceased, when requested so to do, and defendant agreed to perform on her part what was provided for her to do in a separate agreement signed by her that day and delivered to this plaintiff, whereby she agreed to pay John W. Shea, or order, \$6,000 on or before May 15, 1919, in full compliance with said agreement first above referred to, or after the probate of said last will and testament.

Shortly thereafter defendant claims she became dissatisfied and attempted to repudiate said agreements and on April 5, 1919, notified plaintiff to protect his interests in the probate proceedings as if said instruments had not been made, and demanded that they be returned to her. Plaintiff did not comply with this demand and defendant did not pay the \$6,000 when due, whereupon plaintiff brought this action to collect it.

By her answer defendant admitted the making of the agreement sued upon but asked to be relieved from payment on the alleged ground that the instrument was without consideration and was procured by fraud, duress, force and threats of criminal prosecution, which threats overcame the will power and force of defendant.

The case was tried before a jury in Onondaga county in October, 1919, and defendant offered evidence in support of her allegations of fraud, duress, force and threats of criminal prosecution, and plaintiff denied all such charges.

The trial resulted in favor of defendant, and under the evidence, it might be sustained, were it not for the fact that an atmosphere was created during the trial that resulted in denying to plaintiff a trial that was fair and impartial.

Much bitterness was developed between plaintiff and defendant's counsel, and many of the remarks made during the trial between them were almost brutal in their frankness and were many times not only unseemly, but apparently made without a shadow of justification or excuse.

Numerous errors were committed during the progress of the trial that cannot be overlooked.

When defendant was being examined by her counsel on the question of going to see plaintiff at his offices in the city of Syracuse, she was permitted to say, over plaintiff's objection

and exception, that she never of her own free will made an appointment to see him. When defendant's counsel was examining her in chief and she had testified that one Tooley had told her that plaintiff had said to him that he could have defendant electrocuted for poisoning her brother Jim, and she had answered that she did not do it, her counsel exclaimed: "Well, of course you didn't and everybody knows it, but that is what he is trying to work up." Plaintiff promptly asked to have this remark stricken from the record but the motion was denied, to which ruling plaintiff took an exception. This remark made in the presence of the jury when defendant was on her direct examination must have been highly prejudicial to plaintiff. He is a lawyer and it is not difficult to work up prejudice against an attorney before a jury where he is bringing an action against a woman. Here defendant's lawyer, right in the midst of the trial and in the presence of the jury, was permitted to assert that plaintiff was trying to work up a job to fasten on defendant the charge of poisoning her brother and in that way to intimidate her into settling with him and buying him off so that he would not contest the deceased brother's will, by the terms of which all his property was devised to defendant. Such a remark was calculated to excite the passions of the jury against plaintiff and deprive him of a fair hearing.

At another point, when defendant was on direct examination, a copy of a letter purporting to have been written by deceased to plaintiff was produced. No foundation was laid for its reception in evidence and there was no proof that plaintiff had ever received it, but it was received in evidence and read to the jury, over plaintiff's objections and exceptions. It was the copy of a letter which showed ill feeling of the deceased against the plaintiff and should not have been received in evidence without laying proper foundation therefor. The instances where defendant's counsel led witnesses and almost forced into the record hearsay evidence are so numerous that it would be a wearisome task to point them out in detail. At one point defendant was permitted to testify over plaintiff's objection and exception that her sister, Mrs. Perkins, had told her in plaintiff's absence that he "talked perfectly terrible"



about her and said she had forged the will. At another point in the trial Caroline Chapman, a witness for defendant, was permitted to detail a conversation she had with deceased in 1915, in the absence of plaintiff, about trouble he had had with plaintiff. This was received over plaintiff's objection and exception. It was not material to the issue on trial and served no purpose except to convey to the jury that plaintiff and deceased were not friends and tended to prejudice the jury against plaintiff. The trial developed much bitterness between defendant's counsel and plaintiff from start to finish. Charges of every kind were hurled back and forth between them and the entire trial lacked that dignity and poise which should be observed in a trial in a court of record. No matter what shortcomings might be charged against plaintiff and however unfriendly he and defendant may have been, he was at least entitled to fair and courteous treatment when he came into a court of justice and asked to have his claims passed upon by a jury. He may have obtained the instrument sued upon by improper means, but if that was true relief could be afforded if the facts were presented to the jury in an orderly, dignified and courteous manner without resorting to methods that sometimes improperly obtain in a Justice's Court, but which were unseemly in a court of record, and which tended to create such a feeling of animosity and prejudice against plaintiff that it cannot be said he was accorded a fair and impartial trial.

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concur.

Judgment and order reversed and new trial granted, with costs to appellant to abide event, for errors of law, and as a matter of discretion, justice requiring that a new trial be ordered.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CENTRAL UNION TRUST COMPANY OF NEW YORK, Trustee of the Estate of MARCIA ANN GAVIT, Relator, v. JAMES A. WENDELL, as Comptroller of the State of New York, Respondent.

Third Department, May 4, 1921.

**Taxation — income tax — interest on real property mortgage on which recording tax paid is part of mortgagee's taxable income — Tax Law, § 251, exempting mortgages on which recording tax paid from State and local taxation, does not exempt interest from income tax — nature of income tax.**

The interest on real property mortgages on which the recording tax has been paid is one of the elements in determining the taxable income of the mortgagee.

Section 251 of the Tax Law, which provides that all mortgages of real property on which the recording tax has been paid, and the debts and obligations, which they secure, shall be exempt from taxation by the State and the local subdivisions thereof, does not exempt the interest on such mortgages from the income tax.

The income tax is a tax on the individual, and his income is used only in fixing the measure of the tax. It is not imposed directly on any particular income, and the income from a particular source is but one element to be considered in connection with other elements in determining the measure of taxation which is to be imposed on the individual.

JOHN M. KELLOGG, P. J., dissents, with opinion.

CERTIORARI issued out of the Supreme Court and attested on the 12th day of February, 1921, directed to James A. Wendell, as Comptroller of the State of New York, commanding him to certify and return to the office of the clerk of the county of Albany all and singular his proceedings had in adjusting an account for income taxes for the taxable year of 1919 against the petitioner under article 16 of the Tax Law, and in revising said account.

*Larkin, Rathbone & Perry* [Hersey Egginton, John M. Perry and Stewart M. Seymour of counsel], for the relator.

*Charles D. Newton, Attorney-General* [James S. Y. Ivins, Deputy Attorney-General, of counsel], for the respondent.

COCHRANE, J.:

The estate represented by the relator was the owner of certain real estate mortgages on which the recording tax required by section 253 of the Tax Law had been duly paid. Section 251 of that law provides as follows: "All mortgages of real property situated within the State which are taxed by this article and the debts and the obligations which they secure, together with the paper writings evidencing the same, shall be exempt from other taxation by the State, counties, cities, towns, villages, school districts and other local subdivisions of the State," except as therein provided which is not here material. The relator contends that the interest on such mortgages may not be considered for the purpose of ascertaining the "net income" constituting the basis of the income tax imposed by section 351 of the Tax Law. The Comptroller has included such interest as one of the elements in determining such "net income" of the relator and has assessed the income tax against the relator on the basis thereof. The purpose of this proceeding is to test the propriety of the position taken by the Comptroller.

The action of the Comptroller is clearly within the provisions of the Tax Law (§§ 351, 352, 357, 359, as added by Laws of 1919, chap. 627), relating to the imposition of income taxes, and known as the Income Tax Law. The principal contention of the relator is that section 251 of the Tax Law (as amd. by Laws of 1916, chap. 323, and Laws of 1917, chap. 485), which with correlated sections is in article 11, known as the Mortgage Tax Law, was in effect a contract between the State and mortgage investors that the latter on payment of the recording tax imposed by section 253 of the Tax Law (as amd. by Laws of 1916, chap. 323) should be exempt from all other taxation in respect to such mortgages and that the provisions of the so-called Income Tax Law requiring the interest on such mortgages to be considered in fixing the net income with respect to which the income tax is imposed is inconsistent with said section 251 and consequently impairs the obligation of the State's contract with such mortgagees. For the purposes of this discussion it may be assumed without so deciding that the purpose of section 251 was to encourage mortgage investments and that it possesses the characteristics

of a contract between the State and mortgagees who have made their investments prior to the enactment of the income tax provisions of the law. It does not follow, however, that the interest earned by such mortgages was within the purview of such contract so as to be exempt from other taxation. It is true that as between the parties to a mortgage the interest thereon is an incident of the principal and like the latter is controlled by the mortgage provisions. But in considering what is exempt from taxation the rule is that such alleged exemption must be "described in clear and unambiguous language, and appear to be undisputably within the intention of the Legislature." (*People ex rel. Westchester Fire Ins. Co. v. Davenport*, 91 N. Y. 574, 586.) In *Yazoo & Mississippi Valley R. Co. v. Adams* (180 U. S. 1, 22) it was said: "Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the Legislature. \* \* \* And while, as we have held in many cases, Legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies." In *Chicago, Burlington & Kansas City R. R. v. Guffey* (120 U. S. 569, 575) the rule was declared in these words: "It is the settled doctrine of this court that an immunity from taxation by the State will not be recognized unless granted in terms too plain to be mistaken." In the light of the foregoing rule the purpose of the Legislature in enacting the recording tax provisions of the law must be ascertained. Likewise such purpose can only be intelligently ascertained by reference to conditions then existing. Mortgages were subject to assessment by the local assessors. Only the principal of such mortgages was included in the assessment roll. Interest thereon played no part in the system of taxation then in vogue. Clearly the dominant idea in the mind of the Legislature was to render mortgagees independent of the action, capricious or otherwise of local tax officials. It is true that

the State was included in the prohibition against taxing recorded mortgages, but that the controlling purpose was as above indicated is manifested by the detailed enumeration of the subdivisions of the State from the activities of which such mortgagees were rendered immune. "Counties, cities, towns, villages, school districts and other local subdivisions of the State" were each specifically named as being deprived of the right to exercise any of their taxing powers in respect to such mortgagees. The phraseology of the section emphasizes the idea that it was such particular kind of taxation as then existed against which relief was being granted. Otherwise there was no occasion for specifying the various subdivisions of the State. Such idea is further emphasized by the title of said section 251: "Exemption from local taxation." Again, section 253 carefully confines the rate of taxation to the "principal debt or obligation." That is all which in any event was the subject of taxation at the time of that legislation. Interest as such was not taxable. And when in section 251 it was declared that all mortgages "*taxed by this article*" should be exempt the reasonable construction thereof is that it was only the "principal debt or obligation" constituting the basis of taxation thereof as stated in section 253 which was intended to be exempt. Such interpretation is clearly within the rule of strict construction as declared in the authorities above cited. That there is at least a doubt as to whether the taxability of interest was within the legislative mind is, we think, reasonably clear. All doubts and ambiguities, however, must be resolved in favor of the taxing power. We think that sections 251 and 253, construed in the light of conditions existing at the time of their enactment and with reference to the manifest purpose of their enactment, disclose an intent to deal only with such taxation and such methods of taxation as were then prevalent and have no reference to the income derived from such mortgages. There was no occasion to take into account such income or to legislate in reference thereto for the reason that it was not then taxable. Furthermore, it cannot be assumed that the Legislature intended to barter away its taxing powers and every mortgagee must have known that by the mere payment of the recording tax he was not rendered immune from all other taxation in

the future should the general interest of the community or the public exigencies so require. (*People ex rel. Iroquois Door Co. v. Knapp*, 186 App. Div. 172, 175; *affd.*, 227 N. Y. 592; *People ex rel. Gallatin National Bank v. Commissioners*, 67 id. 516; *People ex rel. Cunningham v. Roper*, 35 id. 629, 635.) The possibility of the enactment of an income tax many years in the future did not exist in the minds of the legislators at the time they enacted the recording tax provisions. Those provisions and the exemption created thereby had no reference to an entirely distinct system of taxation at some time in the future such as is created by the income tax provisions. We are not unmindful that it has been held that a tax on income is in reality a tax on the property producing the income. (*Pollock v. Farmers' Loan & Trust Company*, 157 U. S. 581; 158 id. 601; *Hancock v. Singer Manufacturing Company*, 62 N. J. L. 289, 342; *Opinion of the Justices*, 220 Mass. 613, 623.) That might be important in reference to some questions, as for instance if we were considering the legality of a tax on income, there being a constitutional prohibition against such tax on the principal. Our problem here, however, is one of statutory construction and to ascertain the legislative intent, and in a problem of that nature we are not hampered by constitutional restrictions. In our view of sections 251 and 253 of the Tax Law it is as if the Legislature had said, there shall be no other tax on the principal of mortgages except the recording tax, but we reserve the right to impose in the future should circumstances require a tax on the income of such mortgages. If we have properly construed such legislation, the validity of the tax in question necessarily follows.

There is still another view to take of this question. The income tax is not directly at least imposed on any particular income. The recording tax is imposed on the mortgage (§ 253); the income tax is a tax on the individual. It is "imposed upon every resident of the State" (§ 351). His income is used only in fixing the measure of such tax. It is the "net income" on which the tax is computed (§ 351). The "net income" means the "gross income" of the taxpayer less legal deductions (§ 357) and in determining the "gross income" mortgage interest as well as all other income is

included with numerous exceptions specified in section 359. From such "gross income" thus determined are to be subtracted numerous deductions (§ 360) and also certain exemptions (§ 362) before the tax is computed. Hence the income from any particular source is but one element to be considered in connection with other elements in determining the measure of the taxation which is imposed on the individual. In no proper sense may it be said that the tax is imposed on the interest of any particular mortgage. That is merely a factor in the determination of the amount of such taxation. We think, therefore, for the reasons stated that the contention of the relator cannot be sustained.

The determination should be confirmed, with fifty dollars costs and disbursements.

All concur, except JOHN M. KELLOGG, P. J., dissenting, with an opinion.

JOHN M. KELLOGG, P. J. (dissenting):

The State is bound by its contracts which are based upon an actual and not a speculative consideration. (*People ex rel. N. Y. C. & H. R. R. Co. v. Mealey*, 224 N. Y. 187, 197; *First Construction Co. v. State of New York*, 221 id. 295.) Here, in order to induce the taking of real estate mortgages, the Legislature imposed a recording tax by sections 251, 253 and 254 of the Tax Law, and agreed with the relator, who complied with the act, to exempt "all mortgages \* \* \* and the debts and the obligations which they secure, together with the paper writings evidencing the same \* \* \* from other taxation by the State," and the subdivisions of the State, except from taxes imposed under certain sections of the statute which we are not interested in. In effect section 253 requires a payment in advance of a sum which is agreed to be in lieu of all future taxes on account of the mortgage, the debt and the obligation secured, together with the writings evidencing the same. Section 254, relating to mortgages made before the act, whether recorded or unrecorded, is a request to the owner to come within the act and obtain the benefits of the exemption. There the consideration of the contract more clearly appears.

The mortgage secured the payment of the interest as well as the principal; in fact the interest was clearly the moving

reason for making the loan and taking the mortgage. The relator would have kept its money if it was to be returned without interest; it loaned it to secure the interest. The interest is not, therefore, a mere incident to the mortgage, but is an essential part of it, and is a part of the debt secured.

Where the law gives interest as damages for the breach of a contract, it may be considered an incident to the debt; but where the original contract requires the payment of interest, the agreement to pay the interest is as much a part of the debt and obligation as is the agreement to pay the principal. (*Southern Central R. R. Co. v. Town of Moravia*, 61 Barb. 180, 189; *Fake v. Eddy*, 15 Wend. 76; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 583.)

The State income tax is imposed upon net incomes. Interest, to be taxable as income, need not be actually paid. Unpaid interest, which has accrued and is payable, is subject to the tax. (Tax Law, § 350, subd. 6.) The taxpayer must include in his return all interest which is accrued and payable. Subdivision 1 of section 359 speaks of income "received," but subdivision 6 of section 350 provides that the word "received" means "received or accrued." "Accrued" means "due." (*Allen v. Armstrong*, 58 App. Div. 427; 1 C. J. 733.) In *Pollock v. Farmers' Loan & Trust Co.* (*supra*) it was held, under the old Federal Income Tax Law of 1894 (28 U. S. Stat. at Large, 509, chap. 349; Id. 553, § 27 *et seq.*), that income from municipal bonds could not be taxed by the Federal authorities, as they had no right to tax the bonds themselves.

The past due interest upon a mortgage, which by its terms draws interest, forms a part of the net income for taxation. It has not been paid, and the only right to it is that it is payable by the terms of the mortgage, the obligation upon which the tax has been paid; it is a part of the debt secured by the mortgage, and is exempt. Needless to say that mortgage loans were made under the act, and old mortgage loans were continued, in reliance upon the exemption provision. The State is bound to keep its obligation with the mortgagees and cannot be permitted to change its position.

If there is a fair doubt as to the proper construction of section 359 of the Tax Law, the court will be solicitous to adopt the construction which makes for validity rather than



for invalidity. In construing the statute it will be assumed that the State meant to meet its fair obligations and deal honorably with its citizens and is not seeking to avoid its just obligations. The following cases sustain these views: *People ex rel. Cooper Union v. Wells* (180 N. Y. 537); *People ex rel. Cooper Union v. Gass* (190 id. 323); *People ex rel. Roosevelt Hospital v. Raymond* (194 id. 189). In each case it was claimed that an exemption from taxation in the charter of a corporation was not destroyed by a subsequent general tax law. In the *Wells* case it was held that the charter of the relator exempting it from taxation prevented the Legislature from destroying the exemption. The case was without opinion in the Appellate Division (98 App. Div. 623) and the Court of Appeals, but is explained in *People ex rel. Roosevelt Hospital v. Raymond* (194 N. Y. 198, 199). In the *Gass* case it was held that the charter exemption could be repealed by virtue of section 1 of article 8 of the Constitution, which permits all general laws and special laws with reference to corporations to be altered from time to time or repealed. The *Roosevelt Hospital* case explains the other cases, and considers that a general statute embracing the subject of taxation ordinarily repeals an exemption contained in a special charter, but that where the exemption is a matter of contract, a proposition by the State which has been acted upon by the party claiming the exemption, the presumption is that it is not repealed and that the exemption survives the general statute. It could not be presumed that the Legislature intended to violate the good faith and the agreement of the State, but it is presumed to have intended to keep faith and to observe its contracts by continuing the exemption. The constitutional provision has no application here and the agreed exemption continues.

In my judgment a fair construction of the Tax Law exempts the interest upon mortgages which have paid a recording tax. If this construction is wrong, then the part of the statute attempting to destroy the exemption is unconstitutional. I favor reversal.

Determination confirmed, with fifty dollars costs and disbursements.

In the Matter of the Judicial Settlement of the Accounts of  
JAMES W. EGAN, as Executor, etc., of HANNAH EGAN  
MURPHY, Deceased, Respondent.

JOHN MURPHY, Appellant.

Fourth Department, May 4, 1921.

**Partition — interlocutory judgment directing payment of proceeds into Surrogate's Court — surrogate does not have power to direct payment of money to executor in proceedings to sell same property — Code of Civil Procedure, §§ 1538 and 2707, applied — appeal — order directing payment of money to executor affects substantial right of person entitled to share therein.**

Where an interlocutory judgment in a partition action instituted within eighteen months after the death of the owner of the land directs that the property be sold free from liens and on consent of the parties that the money be paid into the Surrogate's Court by paying the same to the county treasurer, the Surrogate's Court has no power in proceedings instituted by the executor to sell said real property for the payment of debts, to direct that said funds be paid over to the executor on his giving a bond.

Section 1538 of the Code of Civil Procedure governs the disposition of proceeds in partition actions, and the surrogate had no power to proceed under section 2707 of the Code of Civil Procedure.

The order directing the payment of said money to the executor affected a substantial right of the appellant, the husband of the decedent, who was entitled to a share of the partition money, in that it deprived him of his right to secure his share in the manner prescribed by section 1538 of the Code of Civil Procedure.

**APPEAL** by John Murphy, husband of Hannah Egan Murphy, deceased, and one of the persons named as devisee in her last will and testament, from that part of an order of the Surrogate's Court of Onondaga county, entered in the office of said surrogate on the 16th day of October, 1920, directing the county treasurer of said county to pay over to the executor herein the sum of \$5,476.05, proceeds of the sale of real property of the deceased deposited with said county treasurer, pursuant to a final judgment of the Supreme Court in a partition action.

*John P. Hennessey*, for the appellant.

*George W. O'Brien*, for the respondent.

HUBBS, J.:

On March 25, 1918, Hannah Egan Murphy died leaving a last will and testament which was admitted to probate in the Surrogate's Court of Onondaga county. Within eighteen months after her death an action to partition the real property of which she died seized was commenced by her husband, John Murphy. An interlocutory judgment in such partition action was entered which directed a sale by a referee of the real estate *free and clear of all liens and incumbrances*. Thereafter a report of sale was made and a final judgment was duly entered. After providing for the payment of liens, taxes, costs and expenses, the final judgment provided as follows:

" 5. That said referee, after making the payments aforesaid divide and apportion the residue among the parties entitled thereto, according to their respective interests therein, as adjudged in said interlocutory judgment herein, and as hereinafter provided. That said referee *pay into Surrogate's Court* the proceeds of the sale of said real property and the moneys received by him as referee herein, after deducting the fees and disbursements as hereinabove provided, by paying the same to the county treasurer of the County of Onondaga to the credit of the several parties to this action according to their respective shares in pursuance of and in compliance with the provisions of the interlocutory judgment herein, to wit:

" (a) That he pay to the plaintiff, John Murphy, in the manner above provided, an one-third thereof, being the sum of \$1,825.37."

The final judgment then provided for the distribution of the balance of said fund to the other parties in interest.

In accordance with said final judgment there was deposited with the county treasurer of Onondaga county the sum of \$5,476.05, the net proceeds of the sale of the real property.

After entry of the interlocutory judgment in said partition action, and within eighteen months after the probate of the will in question, James W. Egan, the executor thereof, commenced a proceeding in the Surrogate's Court of Onondaga county under chapter 18, title 4, article 3, of the Code of Civil Procedure to sell said real property to pay debts and funeral expenses. As a result of such proceeding debts and

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expenses to the amount of \$617.44 were allowed by the surrogate in the order here appealed from, which order also provided that "the amount of costs and expenses of administration be reserved until the further hearing herein," and that, for the purpose of paying said claims and "the reasonable expenses of administration" the funds deposited with the county treasurer be brought into the account on the judicial settlement, to be disposed of by the decree. The county treasurer was directed to pay to the executor said fund of \$5,476.05 and interest upon the filing of a bond for \$6,000, by the executor, to be approved by the surrogate.

John Murphy, the surviving husband, has appealed from said order to this court, and urges that the surrogate had no authority to direct the county treasurer to pay over to the executor the fund of \$5,476.05 deposited with said county treasurer under the final judgment in the partition action.

Section 1538 of the Code of Civil Procedure provides as follows: "When the action is brought before eighteen months have elapsed from the granting of such letters of administration or letters testamentary, as the case may be, upon the estate of a decedent from whom the plaintiff derived his title, and the interlocutory judgment directs, as above provided, that the premises shall be sold, free from the lien of debts, the final judgment shall direct that the proceeds of the sale remaining after the payment of the costs \* \* \* be forthwith paid into court by the referee making such sale by depositing the same with the county treasurer of the county, in which the trial of the action is placed, to the credit of the parties entitled thereto, to await the further order in the premises."

The final judgment in the partition action directed that the net proceeds of the sale be paid into the *Surrogate's Court*. In a partition action there seems to be no authority for the direction to pay said money into the Surrogate's Court, although such authority did exist prior to 1896 under said section 1538 as it then read. (See Laws of 1890, chap. 509; Laws of 1896, chap. 277; Laws of 1918, chap. 305.) The final judgment herein so provided, however, apparently upon consent of all the parties.

The final judgment in the partition action fixed the rights of the appellant and of all other parties in interest. It estab-

lished the amount which the appellant was entitled to receive at \$1,825.37. The manner in which he could withdraw that sum from the hands of the county treasurer was fixed by section 1538 of the Code of Civil Procedure. He might withdraw such money at any time by filing a bond and procuring an order as provided in said section; or, upon a certificate of the surrogate showing that eighteen months had elapsed since the issuing of letters upon the estate of the decedent and that no proceeding for the mortgage, lease or sale of the real property of said decedent was pending, and upon the certificate of the county clerk as provided in said section, he might apply to the court wherein the final judgment was rendered for an order directing the county treasurer to pay over the sum to which he was entitled under said final judgment.

Where a proceeding to sell, lease or mortgage real property for the payment of debts and funeral expenses, commenced within eighteen months after letters were issued, is pending in Surrogate's Court, the fund deposited under a final judgment in a partition action cannot be paid out until the determination of such proceeding, as such fund stands in place of the real property sold in the partition action and is subject to the lien of the decedent's debts. (*Matter of Dusenbury*, 34 Misc. Rep. 666.)

The appellant concedes that his share of such fund established by the final judgment in the partition action is subject to its proportionate share of the debts of decedent established in the proceeding in Surrogate's Court. It is urged by the appellant, however, that the total amount which is a legal charge against said fund under section 2703 of the Code of Civil Procedure should be fixed and determined by the surrogate and deducted from the amount on deposit with the county treasurer, and that the balance should be paid over to the appellant and to the other parties entitled thereto. It is insisted that the surrogate had no authority, when the debts were established at \$617.44, to order the payment of the whole sum of \$5,476.05 to the executor, thereby depriving the appellant of his right, under section 1538 of the Code of Civil Procedure, to apply to the court for an order permitting him to withdraw his share upon furnishing a bond as required

by said section, and making his share subject to a reduction for executor's commissions.

If the surrogate had authority to order the county treasurer to pay over to the executor a fund of \$5,476.05 to enable him to pay debts of \$617.44, he would have had the same authority no matter how large the fund might be. If the final judgment had directed that the fund be paid into the Supreme Court, the procedure for the distribution thereof would have been according to section 1538 of the Code of Civil Procedure and the decisions construing that section. (*Lichtenberg v. Lichtenberg*, 156 App. Div. 535; *Matter of Dusenbury*, 34 Misc. Rep. 666.) Under that practice the Supreme Court could not, in a partition action, order the fund paid over to an executor. The order in question was made by the surrogate on the authority of section 2707 of the Code of Civil Procedure, which provides, in part: "The proceeds of the sale of any real property sold by judgment of another court, which directs said proceeds to be paid into the Surrogate's Court subject to its order, may be directed by such order of the surrogate to be paid to the executor or administrator to be brought into the account on such judicial settlement and disposed of in accordance with the decree made thereupon." (See Laws of 1914, chap. 443.) The language of that section, standing alone, is broad enough to justify the order in question. It will be noted that said section reads: "judgment \* \* \* which directs said proceeds to be paid into the Surrogate's Court." Prior to 1896 said section 1538 provided that "such court may direct such money to be paid into the proper Surrogate's Court." Said section 1538, as it now reads, does not provide for paying surplus funds in a partition action into Surrogate's Court. In an action to foreclose a mortgage upon real property it is provided, in section 1633 of the Code of Civil Procedure, in certain cases mentioned in said section, where the claims of creditors of the deceased mortgagor may be enforced against a surplus fund, that "the surplus money must be paid into the Surrogate's Court." (See Laws of 1915, chap. 643.) It will be seen, by comparing said section 1633, relating to an action to foreclose a mortgage on real property, and said section 1538, relating to an action in partition, that the Legislature has provided different methods

in the given cases for paying out surplus money. This difference, as it existed under other sections of the Code of Civil Procedure prior to the revision of the Surrogates' Court Code (Laws of 1914, chap. 443) was pointed out in *Matter of Dusenbury* (34 Misc. Rep. 666). The statute governing the distribution of surplus moneys in actions for partition of real property is said section 1538; the practice under said section has been laid down by the courts, and should not be departed from without clear and expressed authority.

That part of said section 2707 above quoted would very likely justify the order appealed from if the surplus fund had arisen from an action to foreclose a mortgage upon real property, but as the fund in question was deposited in a partition action the surrogate was without authority to make an order directing that the whole fund be paid to the executor. While it is true that the final judgment in the partition action did direct that said surplus fund be paid into the Surrogate's Court, such judgment did not bestow upon the Surrogate's Court power and authority to make an order which the Supreme Court could not make under said section 1538, and did not authorize the Surrogate's Court to apply to such proceeding the provisions of said section 1633 applicable to a proceeding to distribute surplus funds resulting from the foreclosure by action of a real property mortgage.

The order appealed from affected a substantial right of the appellant and he is aggrieved thereby. (See Code Civ. Proc. § 2754.) The order, so far as appealed from, should be reversed, with ten dollars costs.

All concur.

Order, so far as appealed from, reversed, with ten dollars costs and disbursements.

DANIEL E. FANE, Appellant, v. THE NATIONAL ASSOCIATION  
OF RAILWAY POSTAL CLERKS, Respondent.

Fourth Department, May 4, 1921.

**Insurance — accident insurance — injuries from external, violent and accidental means — rupture received by mail clerk while performing customary work not within policy.**

A railway mail clerk who, while engaged in his customary work of piling mail sacks in a car in the usual and ordinary way, suffered a rupture, did not receive an injury within the meaning of a policy of insurance against injuries through external, violent and accidental means.

APPEAL by the plaintiff, Daniel E. Fane, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Cattaraugus on the 5th day of June, 1920, upon the verdict of a jury rendered by direction of the court.

*M. B. Jewell*, for the appellant.

*George H. Pierce* [*George A. Larkin* of counsel], for the respondent.

HUBBS, J.:

The plaintiff in this action was insured by the defendant against personal accidental injuries. The certificate issued by the defendant contained the following clause: "If the holder of this certificate shall receive bodily injuries during the continuance of this certificate through external, violent and accidental means" he shall be entitled to recover, etc. The plaintiff was a railway postal clerk. On the 20th day of October, 1916, at Binghamton, while in the performance of his duties, he was engaged in piling heavy mail bags on a stack seven or eight feet high. While doing that work he strained the covering of his intestines and caused a rupture. An action was brought on the certificate and the jury found that the rupture was caused through external, violent and accidental means within the meaning of the policy. The trial

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court set aside the verdict of the jury and directed a verdict for the defendant. The sole question for our consideration is whether or not, under any inference which could be drawn from the evidence, the jury was justified in finding as it did.

There is no dispute in the evidence. The plaintiff testified: "I was lifting a heavy sack of mail to put it way up here, and felt something slip down here; down in my testicle. \* \* \* Q. So that in reaching up you felt this give way? A. Yes, sir." That is all there is of the case. It is undisputed that the plaintiff was engaged in his customary work. There is no claim or pretense that the bag which he was lifting was any heavier than other bags which he had lifted in the same way, or that the pile upon which he was attempting to place it was any higher than usual. It is not claimed that the car gave a sudden lurch or that he slipped, or was pushed or jarred, or that anything out of the ordinary happened. He simply attempted to lift the heavy mail bag in question on to the top of the pile, doing just what he expected to do and what he was accustomed to do, and doing it in the usual and ordinary way. The only thing unusual or unexpected about the whole affair was that the strain of lifting the bag on this particular occasion caused a rupture. From those facts the appellant urges that the rupture was caused "through external, violent and accidental means."

It is undoubtedly true that the act of lifting the mail bag produced an unforeseen consequence, and the consequence might commonly be called an accidental injury, and the result of lifting the bag might be accidental, but the wording of the policy is "through \* \* \* accidental means." The means which the plaintiff used to place the bag were exactly those which he intended to use and precisely those he had used on many other occasions. It cannot be said that the means were accidental. The most that can be said is that the result was accidental. An unexpected result followed, but that result did not follow through accidental means. He was injured from doing what he intended to do and doing it in exactly the way he intended to do it, and the rupture was not the result of accidental means. This conclusion is sustained by many decisions.

One of the leading cases in point arose in this department,

the case of *Appel v. Aetna Life Ins. Co.* (86 App. Div. 83; *affd.*, without opinion, 180 N. Y. 514). The opinion of Mr. Justice McLENNAN in that case, it seems to me, is a complete answer to the appellant's contention in this case. There the plaintiff's intestate injured his appendix while riding a bicycle by the ordinary exertion of riding without having suffered any fall or shock. It appeared that the muscles used in the operation of riding the bicycle necessarily rubbed against the appendix and inflamed it. In the opinion it was said: "Our attention has not been called to any case which holds, and we have failed to discover any authority for the proposition, that a result which is produced by means, all of which and every detail of which was intended, can be said to have been produced by accidental means, simply because the result which followed the employment of such means, exactly in the manner intended, was different from the result anticipated. In order that the plaintiff may succeed in the case at bar, it is necessary that we should assent to that exact proposition. We think that is not the proper construction or true meaning of the language of the policy in suit."

In the case of *Niskern v. United Brotherhood* (93 App. Div. 364) Mr. Justice WILLARD BARTLETT, speaking for the court in the Second Department, expressly approved of the *Appel* case and quotes from the opinion of Mr. Justice McLENNAN. In that case the plaintiff, a carpenter, was suffering from hardening of the blood vessels, and the strain of lifting a heavy timber ruptured a diseased blood vessel. The court held that there could be no recovery.

Where one suffering from fatty degeneration of the heart ruptures that organ through over-exertion in the ordinary way, the injury is not caused by accidental means. (*Shanberg v. Fidelity & Casualty Co.*, 158 Fed. Rep. 1.)

Where a dilation of the heart was caused by the exertion of a man in raising and lowering himself repeatedly from the arms of a chair, it was held that as the exercise was voluntary and intended there could be no recovery on an accident insurance policy. (*Hastings v. Travelers' Ins. Co.*, 190 Fed. Rep. 258.)

In a case where death resulted from the rupture of an artery caused by the insured in reaching out to close a window,

it was held that there could be no recovery on an accident insurance policy. (*Feder v. Iowa State Traveling Men's Association*, 107 Iowa, 538; 43 L. R. A. 693.)

Many more cases, from different jurisdictions, might be cited in support of the same proposition. An interesting case arose in Buffalo, N. Y. A man named Pixley was suffering from neuralgia. He sent to the drug store and purchased morphine tablets. While suffering pain he took the bottle of tablets and poured some into his hand. At the time his hand shook and his face was drawn with pain and covered with perspiration. His housekeeper, who was in the room, asked what he was doing and he told her to leave him alone, that he knew what he was doing. He took the tablets and died as the result of morphine poisoning. The trial court held that the plaintiff had failed to establish a cause of action for injury by accidental means, and granted a nonsuit. The case came to this court and was affirmed by a vote of three to two, without opinion, and was also affirmed in the Court of Appeals, without opinion. The trial court based the nonsuit upon the ground that the deceased intended to take the morphine, that the means were not accidental, but deliberate and intentional, and that only the result was accidental and, therefore, not covered by the policy. (*Pixley v. Commercial Travelers Mut. Accident Assn.*, 165 App. Div. 950; *affd.*, 221 N. Y. 545.)

There would be no question but what the trial court in the case at bar was right in directing a verdict for the defendant if it were not for the late case of *Lewis v. Ocean Accident & Guarantee Corporation* (224 N. Y. 18). In that case a well, healthy man had a pimple on his lip. It looked like an ordinary pimple. It became larger and inflamed, and the insured consulted a physician. The physician testified that there was a punctured wound in the lip which had inflamed and infected the deeper tissues. The insured died as the result of the inflammation of the brain produced by a germ from the infected pimple. Judge CARDOZO, writing, said: "We think there is testimony from which a jury might find that the pimple had been punctured by some instrument, and that the result of the puncture was an infection of the tissues. If that is what happened, there was an accident.

We have held that infection resulting from the use of a hypodermic needle is caused by 'accidental means' \* \* \*. The same thing must be true of infection caused by the puncture of a pimple." The judge calls attention to the evidence of the plaintiff's expert to the effect that the entrance of the germ from the skin to the deeper tissues was the result of trauma, and that trauma is almost invariably the cause of such infections, and that the punctured wound was a sign of trauma, and was an adequate cause, or, at least, that the jury might so find.

The case of *Bailey v. Interstate Casualty Co.* (8 App. Div. 127; *affd.*, 158 N. Y. 723) was cited in the opinion. The opinion in that case was written by Mr. Justice MERWIN. There a physician injected morphine into his leg, resulting in infection. It was claimed by the defense that the morphine caused the inflammation. It was claimed by the plaintiff that it was caused by a germ. Mr. Justice MERWIN said: "The plaintiff voluntarily injected the morphine, and if that caused the injury it could hardly be accidental. Upon the evidence, however, it might have been found that the injury was in no way attributable to the morphine. If not, then the question would be whether the injury was attributable to the introduction of the needle deeper than was intended and so an irritation produced which induced the inflammation of the cellular tissue, or whether by reason of the needle or skin not being clean, something was, in the act of puncturing, transferred to the wound which induced the resulting condition." It will be seen from the above quotation that the case relied upon by Judge CARDOZO did not hold anything which sustains the appellant's contention in this case.

It seems to me that the *Bailey* case and the *Lewis* case are both clearly distinguishable from the case at bar, and that the principle announced in those cases is simply that where infection is caused by a germ entering a wound and producing an injury, the injury is caused by accidental means. That is far from holding that if a person suffering from heart disease over-exerts himself and dies as the result of the over-exertion, it can be said that he died from accidental means. It is not to be presumed that the Court of Appeals intended to overrule its decision in the case of *Appel v. Aetna Life Ins. Co.*, and

the decision in the case of *Pixley v. Commercial Travelers Mut. Accident Assn.*, without even calling attention to those decisions in the opinion.

The case was properly decided at the Trial Term and the judgment should be affirmed, with costs.

All concur; KRUSE, P. J., not sitting.

Judgment affirmed, with costs.

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**BANK OF ITALY, Respondent, v. MERCHANTS NATIONAL BANK,  
Appellant.**

Fourth Department, May 4, 1921.

**Contracts — telegram by bank with which money deposited to another bank guaranteeing payment for goods bought by third person imposes primary obligation — breach of contract of sale not defense to action on drafts — allegations of fulfillment of contract unnecessary — telegram to be construed most strongly against sender — complaint stating cause of action.**

Telegram by the defendant with which the purchaser of goods had deposited money for the price, that "We guarantee payment" of the purchase price on presentation of the original bill of lading, which was sent to the plaintiff, which thereafter cashed two drafts drawn by the seller on the defendant and the purchaser, constitutes a letter of credit and an unconditional primary promise to pay and not a secondary promise or guaranty of collection only, and the plaintiff had the right to proceed against the defendant in the first instance on its refusal to pay the drafts. The defendant cannot defend on the ground that there has been a breach of the contract by the vendor, and it was not necessary to allege in the complaint fulfillment of the contract by the vendor or demand on and failure to pay by the vendee.

The telegram was prepared by the defendant and it is necessary to take the words as strongly against it as a reasonable reading will justify.

Complaint examined, and *held*, to state facts sufficient to constitute a cause of action.

APPEAL by the defendant, Merchants National Bank, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Chautauqua on the 11th day of November, 1920, upon the

decision of the court rendered after a trial at the Chautauqua Special Term, overruling the demurrer of the defendant to the amended complaint.

*Thrasher, Cole & Clapp* [Louis L. Thrasher and John S. Leonard of counsel], for the appellant.

*Nugent & Heffernan* [Albert E. Nugent of counsel], for the respondent.

HUBBS, J.:

This is an appeal from an interlocutory judgment overruling a demurrer of the appellant to the respondent's complaint. The respondent is a foreign corporation, engaged in business at San Francisco, Cal. The appellant is a national bank engaged in business in the city of Dunkirk. The complaint alleges that the Sanesi & Maron Company of Dunkirk, N. Y., bought of Silvio Rossi of San Francisco two carloads of dried grapes at the agreed price of \$24,000; that said dried grapes were delivered to a railroad company at Fresno, Cal., for shipment to said purchaser at Dunkirk, N. Y.; that the railroad company issued bills of lading for the said cars and the said cars were shipped; that said purchaser deposited with the appellant the sum of \$24,000 to pay the purchase price of said two cars of dried grapes on presentation to said appellant bank at Dunkirk of the original bills of lading; that thereafter, and on February 2, 1920, the appellant bank, for value received, sent the following telegram to the respondent:

"DUNKIRK, N. Y., 258 P, Feb. 2, 1920.

"BANK OF ITALY, San Francisco, Cal.:

"We guarantee payment two cars dried grapes bought by Sanesi & Maron Company this city from Silvio Rossi San Francisco amounting about twenty-four thousand dollars. Payment will be made on presentation original bill lading here.

"THE MERCHANTS NATIONAL BANK."

That thereafter, and on February fourth, the vendor, Silvio Rossi, brought to the respondent bank the bills of lading of said two cars of dried grapes and made drafts for the same on the Sanesi & Maron Company and Merchants National Bank.

The respondent cashed the drafts for the said two cars of dried grapes. The drafts were presented by the respondent to the appellant bank and payment was refused. This action was brought to recover the amount. The appellant demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The telegram sent by the appellant to the respondent constituted a letter of credit and was an independent contract between the appellant and the respondent upon the breach of which by the appellant the respondent had an absolute right of action if it were not for the word "guarantee" contained in the telegram. (*Frey & Son, Inc., v. Sherburne Co.*, 193 App. Div. 849; *American Steel Co. v. Irving National Bank*, 266 Fed. Rep. 41.) There is a very interesting discussion of the law applicable to letters of credit in 32 Harvard Law Review, 1; also in 34 Harvard Law Review, 533.

It is the contention of the appellant, however, that the word "guarantee" contained in the telegram imposed upon the appellant a secondary obligation and not a primary obligation as is usually imposed by a letter of credit, and the appellant urges that the telegram was not a direct obligation, and that the appellant could not be made liable to the respondent on a letter of credit unless the purchaser, the Sanesi & Maron Company, was liable to Silvio Rossi for the purchase price of the two carloads of dried grapes; in other words, that the wording of the telegram shows upon its face that it is a promise to answer for the debt of another and being secondary that it is not enforceable against the appellant without alleging in the complaint and proving upon the trial the non-performance of the contract on the part of the purchaser, the Sanesi & Maron Company.

That contention is correct, of course, if it be conceded that the obligation is secondary and a promise to answer for the debt or default of another. On the other hand, if the obligation assumed by the appellant is a direct, primary obligation to pay, then the action could be brought direct upon the letter of credit, without alleging default on the part of the purchaser, the Sanesi & Maron Company. The theory of the appellant should not be sustained if there is any way to avoid it. The construction which the appellant places upon the contract,

if sustained by the courts, would be a serious restriction upon ordinary business methods.

The question presented resolves itself into the single inquiry of whether or not, as a matter of law, the telegram in question was a contract to answer for the debt or default of the Sanesi & Maron Company, or whether it was a direct, primary promise to pay. I think that the telegram was an unconditional primary promise by the appellant to pay and not a secondary promise or guaranty of collection only, and that the appellant cannot defend upon the ground that there has been a breach of the contract by the vendor. Neither the appellant nor the respondent was a party to the contract of purchase and sale and the appellant is not in a position in this action to avail itself of any defense which the vendee might have had for damages growing out of the contract. If I am right in that conclusion, then it was not necessary to allege in the complaint fulfillment of the contract by the vendor or demand upon and failure to pay by the vendee. The complaint alleges that the vendee, the Sanesi & Maron Company, deposited \$24,000 with the appellant bank prior to the sending of the telegram. The case of *El Paso Bank & Trust Co. v. First State Bank*, 202 S. W. Rep. (Tex.) 522, seems to be exactly in point. In that case the telegram read as follows:

"FIRST STATE BANK, Eustis, Florida:

"We guarantee payment three hundred dollars by Texas Produce Company for carload of watermelons.

"[Signed] EL PASO BANK & TRUST CO."

In that case the telegram was held to be an absolute guaranty of payment and not a guaranty of collection,

In the case of *Brown v. Curtiss* (2 N. Y. 225) the payee of a note made the following indorsement upon the back of it and transferred it: "I guarantee the payment of the within." The court held that such indorsement was a guaranty of payment, not conditional but absolute.

In the case of *Loos v. McCormack* (107 App. Div. 8) the defendant guaranteed a bond and mortgage in the following language: "I do hereby guarantee unto said John H. Loos the payment and collection of the said bond and mortgage and of the interest due and to grow due thereon, at the time



and in the manner therein mentioned, and I do promise to pay the money at maturity thereof." The case went up on an appeal from an interlocutory judgment sustaining the plaintiff's demurrer to the defendant's answer and the court held that the agreement constituted a guaranty of payment and not a guaranty of collection, and that the holder might proceed in the first instance against either the principal or the guarantor.

In the case of *First National Bank v. Jones* (219 N. Y. 312) a verdict was directed by the trial court in favor of the plaintiff. The Court of Appeals held that the agreement in question was an absolute agreement and an unconditional guaranty as a matter of law, and that there was no error in directing a verdict for the plaintiff. In the opinion Judge CHASE says: "The meaning of the guaranty depends upon the intention of the parties." The holding of the court necessarily implied that the meaning was so clear from the instrument that there was no question for the jury, but that it should be passed upon as a question of law.

Assuming, however, that the meaning of the letter of credit in the case at bar is not so clear that it can be held as a matter of law to be an absolute unconditional guaranty, nevertheless the judgment overruling the demurrer should be sustained, for if there is any question of intent to be determined after a hearing of the evidence, the demurrer could not be sustained. In determining this question it should, of course, be kept in mind that this letter of credit was prepared by the appellant and that in construing it, it is necessary to take the words as strongly against the appellant as a reasonable reading will justify.

I advise that the judgment be affirmed, with costs.

All concur; LAMBERT, J., not sitting.

Interlocutory judgment affirmed, with costs, with leave to the defendant to plead over within twenty days upon payment of the costs of the demurrer and of this appeal.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
MIKE COOK, Appellant.

Fourth Department, May 4, 1921.

**Intoxicating liquors — constitutionality of Liquor Tax Law, as amended by Laws of 1920, chapter 911 — extent of power of State to legislate for the purpose of enforcing Eighteenth Amendment to Federal Constitution — defendant properly convicted of violation of Liquor Tax Law — amendment to indictment substituting real name of defendant was proper.**

The States have the same power they had before the adoption of the Eighteenth Amendment to the Federal Constitution to prohibit traffic in intoxicating liquors and Congress has the added power given by the amendment, but the power of the States to legislate on the subject is limited by the second section of the amendment to the passage of "appropriate legislation" to enforce such amendment and they cannot legally enact laws repugnant to those enacted by Congress upon the subject.

State laws in so far as they conflict with and are repugnant to the Volstead Act are abrogated and nullified by that act, but in so far as they are "appropriate legislation" to enforce said Eighteenth Amendment they are legal and enforceable.

The Liquor Tax Law, as amended by chapter 911 of the Laws of 1920, in so far as it permits the traffic in intoxicating liquors on the payment of a tax is void, but it is valid in so far as it is made a crime to traffic in intoxicating liquors.

Accordingly, the defendant was properly convicted of a violation of the Liquor Tax Law. Furthermore, the defendant was charged with violating the Liquor Tax Law, and if the amendment were void, the act as it stood before the amendment is in force and operation and the defendant was properly convicted thereunder.

The fact that different penalties are provided in the State statute and in the Volstead Act does not make the State statute void.

The indictment was properly found against the defendant, and the court had the power to permit an amendment substituting the defendant's real name in place of a fictitious name.

APPEAL by the defendant, Mike Cook, from a judgment of the County Court of Cattaraugus county, rendered on the 18th day of October, 1920, convicting him of violating the Liquor Tax Law of the State of New York.

*J. M. Seymour*, for the appellant.

*Archibald M. Laidlaw*, District Attorney, for the respondent.

HUBBS, J.:

Upon the trial of the defendant his counsel, by objections and exceptions to the rulings made by the court, raised the question that the defendant could not be legally convicted of the crime of violating the Liquor Tax Law because that law had been superseded and nullified by the adoption of the Eighteenth Amendment to the Constitution of the United States and the enactment of the National Prohibition Act (41 U. S. Stat. at Large, 305, chap. 83), being the act of October 28, 1919, known as the Volstead Act.

The first two sections of the Eighteenth Amendment read as follows:

"SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." (40 U. S. Stat. at Large, 1941, 1942.) That amendment was ratified on January 29, 1919.

Congress, in pursuance of said second section of the Eighteenth Amendment, enacted the Volstead Act, which, in title II, section 1, provides as follows: "The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes." (41 U. S. Stat. at Large 307, tit. 2, § 1.)

By section 3 of the same title it is provided that "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as beverage may be prevented." (41 U. S. Stat. at Large, 308,

tit. 2, § 3.) Section 29 of the same title of the act provides the penalties for the violation thereof. (41 U. S. Stat. at Large, 316, tit. 2, § 29.)

After the enactment of the Volstead Act, this State, by chapter 911 of the Laws of 1920, amended the State Liquor Tax Law (Consol. Laws, chap. 34). The evident intent of said amendment was to permit the sale by the holder of a liquor tax certificate of liquor containing not more than two and seventy-five hundredths per centum of alcohol by weight to be used for beverage purposes, under certain conditions and restrictions as provided in the act. The term "liquors" was defined in said act as containing "At least one-half of one per centum of alcohol by weight." "Intoxicating liquors" were defined in said act as those containing more than two and seventy-five hundredths per centum of alcohol by weight and "non-intoxicating beverages," as liquors containing not more than two and seventy-five hundredths per centum of alcohol by weight, and used or intended to be used for beverage purposes. The act provided that it should be unlawful "To manufacture, sell or transport intoxicating liquors [those containing more than two and seventy-five hundredths per centum of alcohol by weight] for beverage purposes within the State." The act also made it unlawful for any person who had not paid a tax as provided in the act to sell or give away any liquor containing at least one-half of one per centum of alcohol by weight. It provided penalties for the violation thereof different from those provided in the Volstead Act. (See Liquor Tax Law, §§ 2, 36, 43, as amd. by Laws of 1920, chap. 911; *Id.* § 30, as added by Laws of 1920, chap. 911.)

There were, therefore, in existence at the same time two acts, the State Liquor Tax Law and the Volstead Act. The State act purported to make it lawful under certain conditions and restrictions for persons who had paid the liquor tax to traffic in liquor containing at least one-half of one per centum and not over two and seventy-five hundredths per centum of alcohol by weight, and the Volstead Act made it unlawful to traffic in liquor containing one-half of one per centum or more of alcohol by volume. In view of that situation, can it be held that the State act was a valid act, and that a violation of its provisions constituted a crime?

Prior to the enactment of the Eighteenth Amendment the regulation of the manufacture and sale of intoxicating liquors, apart from the interstate commerce regulations, was exercised exclusively by the States under the general police powers. (*Mugler v. Kansas*, 123 U. S. 623; 31 Law. Ed. 205; *Matter of Rahrer*, 140 U. S. 545; *sub nom. Wilkerson v. Rahrer*, 35 Law. Ed. 572; *Purity Extract Co. v. Lynch*, 226 U. S. 192; 57 Law. Ed. 184; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156; 64 Law. Ed. 194.)

The Federal government is one of delegated powers. (*United States v. Cruikshank*, 92 U. S. 542.)

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (U. S. Const., 10th Amendt.) Statutes enacted by the different States to regulate the manufacture and sale of intoxicating liquors were enacted in the exercise of their acknowledged sovereignty under their reserved power, the police power, and the Federal government had no power to enact laws upon the subject until such power was delegated by the Eighteenth Amendment.

Does the fact that the Federal Government has enacted the Volstead Act, in pursuance of the provisions of the Eighteenth Amendment, deprive the States of the reserved police power which they formerly possessed, and prevent them from legislating for the prohibition of the sale of intoxicating liquors? If not, can the State Liquor Tax Law be held to be "appropriate legislation" to enforce the Eighteenth Amendment within the meaning of section 2 thereof, which provides: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The case of *Rhode Island v. Palmer* (253 U. S. 350; 64 Law. Ed. 946) makes it clear that such parts of the State Liquor Tax Law as purport to legalize the sale of liquors containing one-half of one per centum or more of alcohol by volume by persons who have paid a liquor tax are abrogated and inoperative because repugnant to the provisions of the Eighteenth Amendment, as construed by the Supreme Court of the United States in said case, where it is said in conclusions 6 and 7 of the opinion:

"6. The first section of the Amendment — the one embody-

ing the prohibition — is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act — whether by Congress, by a State Legislature, or by a territorial assembly — which authorizes or sanctions what the section prohibits. 7. The second section of the Amendment — the one declaring ‘The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation’ — does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.”

The Eighteenth Amendment, however, does not purport to grant to Congress the exclusive power to legislate upon the question of traffic in intoxicating liquors. It grants to Congress only “concurrent power” and does not by its terms deprive the States of their reserved police power to prohibit such traffic. The words of the section are clear: “The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.” The States have, therefore, the same power which they had before the passage of the Eighteenth Amendment to prohibit traffic in intoxicating liquors and Congress has the added power given by such amendment. The power of the States to legislate on the subject is limited by the second section of the amendment to the passage of “appropriate legislation” to enforce such amendment and they cannot legally enact laws repugnant to those enacted by Congress upon the subject. State laws thereon, in so far as they conflict with and are repugnant to the Volstead Act are abrogated and nullified by that act, but in so far as they are “appropriate legislation” to enforce the said Eighteenth Amendment they are legal and enforceable. In *Commonwealth v. Nickerson* (236 Mass. 281; 128 N. E. Rep. 273) the Supreme Court of Massachusetts said: “We are of opinion that the word ‘concurrent’ in this connection means a power continuously existing for efficacious ends to be exerted in support of the main object of the amendment and making contribution to the same general aim according to the needs of the State, even though Congress also has exerted the power reposed in it by the amendment by enacting enforcing legis-

lation operative throughout the extent of its territory. Legislation by the States need not be identical with that of Congress. It cannot authorize that which is forbidden by Congress. But the States need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor. It is conceivable also that a State may forbid under penalty acts not prohibited by the act of Congress. The concurrent power of the States may differ in means adopted provided it is directed to the enforcement of the amendment. Legislation by the several States appropriately designed to enforce the absolute prohibition declared by the Eighteenth Amendment is not void or inoperative simply because Congress, in performance of the duty cast upon it by that amendment, has defined and prohibited beverages and has established regulations and penalties concerning them. State statutes, rationally adapted to putting into execution the inexorable mandate against the sale of intoxicating liquors for beverage contained in section 1 of the amendment by different definitions, regulations and penalties from those contained in the Volstead Act and not in conflict with the terms of the Volstead Act, but in harmony therewith, are valid. *Existing laws of that character are not suspended or superseded by the act of Congress.* The fact that Congress has enacted legislation covering in general the field of national prohibition does not exclude the operation of appropriate State legislation directed to the enforcement by different means of prohibition within the territory of the State."

The following cases enunciate the same principle: *Ex parte Guerra* (— Vt. —; 110 Atl. Rep. 224); *Jones v. Hicks* (150 Ga. 657; 104 S. E. Rep. 771); *Scroggs v. State* (150 Ga. 753; 105 S. E. Rep. 363); *State v. Fore* (180 N. C. 744; 105 S. E. Rep. 334); *City of Shreveport v. Marx* (— La. —; 86 So. Rep. 602); *State ex rel. Stranahan v. District Court* (58 Mont. 684; 194 Pac. Rep. 308); *Allen v. Commonwealth* (— Va. —; 105 S. E. Rep. 589); *Ex parte Crookshank* (269 Fed. Rep. 980); *Franklin v. State* (88 Tex. Crim. 342; 227 S. W. Rep. 486); *Woods v. City of Seattle* (270 Fed. Rep. 315); *United States v. Peterson* (268 id. 864); *Ex parte Ramsey* (265 id. 950). All of those cases grew out of the construction of laws existing at the time of the enactment of the Volstead Act. The following

cases in this State hold that the amendment of the Liquor Tax Law, passed after the enactment of the Volstead Act, being chapter 911 of the Laws of 1920, the statute in question in this case, is enforceable and that a violation thereof constitutes a crime: *People v. Foley* (113 Misc. Rep. 244); *People v. Mason* (186 N. Y. Supp. 215); *Ex parte Finegan* (270 Fed. Rep. 665).

The only case which I have been able to find which seems to be in conflict is the case of *State v. Green* (— La. —; 86 So. Rep. 919) where the court said: "Act 66 of 1902,\* by prohibiting the selling of intoxicating liquors without a license, implies the right of any and every person to obtain the license. Such a law, if enacted subsequent to the adoption of the Eighteenth Amendment, would not be 'appropriate legislation.' It would be absolutely violative of the amendment. The statute is altogether inconsistent with the constitutional amendment, and is therefore without effect." That case seems to be in conflict with the case of *City of Shreveport v. Marx* (*supra*), previously decided by the same court, and it is also in conflict with all other cases upon the question. In those cases it was held that the fact that the State statutes made it a crime to traffic in liquor, unless a license had been procured as provided in the State statutes, did not make the statutes void and unenforceable because in conflict with the Eighteenth Amendment or the Volstead Act. It was held that such parts of the statutes as provided for the sale of intoxicating liquors upon procuring a license were in conflict with the Eighteenth Amendment and the Volstead Act and were, therefore, void and unenforceable, but that the parts of such statutes as made it a crime to traffic in such liquors remained in full force and operation. In the case of *Commonwealth v. Nickerson* (*supra*) the court said: "The general purpose of R. L. c. 100, is prohibition, except as local option manifested by annual votes in the several municipalities effectuated by the granting of licenses through municipal boards may result in a regulated method of sales by licensees. The burden of proving such authorization rests upon a defendant, however.

\* See La. R. S. § 910, as amd. by La. Acts of 1902, No. 66, p. 93; 1 Wolff Const. & Stat. La. 444.—[REP.]



Upon a complaint for an illegal sale the commonwealth makes out its case by showing a sale of intoxicating liquor. The defendant, in order to escape conviction, must prove his license. R. L. c. 219, § 7; *Commonwealth v. Regan*, 182 Mass. 22, 25; 64 N. E. 407. As matter of statutory construction, the prohibition is general, the license is exceptional. The latter is dependent upon the efficacy of a valid local vote and a genuine license. This being the purpose and plan of the statute, its prohibitory features are not so dependent upon those respecting license as to be swept away when those as to license are stricken down by the Eighteenth Amendment. The general rule of the statute continues to prevail, even though the law has so changed that the special defense can no longer be made out. It follows that R. L. c. 100, has not been abrogated by the Eighteenth Amendment and the Volstead Act. The sections under which the complaint was framed against the defendant are still operative and efficacious."

That opinion referred to a State statute which was in force when the Eighteenth Amendment was adopted, but I think the same principle applies to the statute in question in the case at bar. That statute prohibits the traffic in intoxicating liquors unless a liquor tax is paid and a certificate issued. The provision permitting such traffic upon payment of a tax is void, but the provision making it a crime to traffic therein remains in force.

It is a familiar principle that a statute may be unconstitutional in part and valid in part, if the parts which are void can be separated from those which are valid. (*Presser v. Illinois*, 116 U. S. 252; *People ex rel. Devery v. Coler*, 173 N. Y. 103.) I think that the statute in question can be so separated, and that the parts which prohibit traffic in liquor are valid and that a violation thereof constitutes a crime. Section 40 of said act (Laws of 1920, chap. 911) provides: "§ 40. If any section or provision of this act shall be held to be invalid, it is hereby provided that all other provisions of this act which are not expressly held to be invalid shall continue in full force and effect."

The fact that different penalties are provided in the State statute and in the Volstead Act does not make the State statute void. (*Commonwealth v. Nickerson*, *supra*; *Ex parte Crookshank*, *supra*.)

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First Department, May, 1921.

If, however, the amendment of the Liquor Tax Law in question should be held to be unconstitutional and void, still the defendant was legally convicted. He was charged in the indictment with a violation of the Liquor Tax Law. The Liquor Tax Law of the State was amended by the amendment in question in 1920. If that amendment is unconstitutional and void, the Liquor Tax Law as it stood before that amendment is in force and operation, and the defendant was properly convicted thereunder. (*People ex rel. Farrington v. Mensching*, 187 N. Y. 8.) The indictment was properly found against the defendant — the court had authority to permit the amendment substituting the name of the defendant in place of the fictitious name contained in the indictment. The judgment of conviction should be affirmed.

All concur.

Judgment of conviction affirmed.

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FRANKLIN KNITTING MILLS, Respondent, v. ISIDOR H. MEYERSON, Appellant.

First Department, May 27, 1921.

**Pleadings — bill of particulars — action on promissory notes — counterclaim on breach of contract of sale of goods — bill of particulars stating that orders for goods were in writing — letters referring to oral orders admissible.**

In an action on promissory notes the defendant interposed a counterclaim based on a breach of contract of the sale of goods and in a bill of particulars furnished by him stated that the orders for the goods were in writing. *Held*, that it was error to refuse to admit in evidence letters written by the defendant to the plaintiff which referred to oral orders given theretofore, and which were repeated in the letters, and to refuse to permit the defendant to testify to the oral orders on the ground that he was limited by his bill of particulars to written orders.

APPEAL by the defendant, Isidor H. Meyerson, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 10th day of April, 1920, on the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 21st day of April, 1920, denying defendant's motion for a new trial made upon the minutes.

*Charles Goldzier* of counsel [*House, Grossman & Vorhaus*, attorneys], for the appellant.

*Otto C. Sommerich* of counsel [*Maxwell C. Katz* with him on the brief], for the respondent.

PAGE, J.:

The action was brought to recover upon four certain promissory notes made by the defendant in favor of the plaintiff for \$1,800, each payable in four months. The answer contains a defense and counterclaim alleging that the Smart Set Specialty Clothing Co., Inc., was organized and incorporated by the plaintiff for the express purpose of manufacturing and selling garments to be made solely out of the goods manufactured by the plaintiff. The defendant entered into a contract with the plaintiff to purchase from it forty shares of the stock of the said Smart Set Specialty Clothing Co., Inc., of the par value of \$50 each, for the sum of \$10,000. The defendant then owned ten shares and thus secured the entire capital stock of the said corporation. The defendant agreed to pay for said stock the sum of \$9,000, to be paid \$1,000 in cash and \$9,000 by giving five promissory notes for \$1,800 each. The plaintiff further agreed in said contract to extend to the said corporation sixty days' credit in amount not to exceed \$2,500, this provision to continue during the life of the contract so that the said corporation should at all times have standing a credit for merchandise of \$2,500. The plaintiff also agreed as soon as possible after receiving orders, and in the usual course of business, to deliver to the said corporation on account of said credit knit cloth manufactured by the party of the first part of the quality, shades and prices therein specifically set out. The answer further alleges that the plaintiff has failed, refused and neglected to furnish to the Smart Set Specialty Clothing Co., Inc., the goods mentioned in said contract, although the same have been duly ordered and demanded, and that such goods as the plaintiff did furnish were of an inferior grade and defective both in workmanship and quality of material, and that the notes mentioned in the complaint were the notes mentioned in the contract. Damages are alleged in the sum of \$50,000. There are other allegations of the answer that would be appropriate to a defense of fraud,

in that the representations that plaintiff would furnish and deliver the goods were made as an inducement to entering into the contract, and that at the time said representations were made the plaintiff had no intention of carrying them out.

The plaintiff moved for a bill of particulars of some seventeen different items. The defendant, without waiting for the motion to be granted, gave a very full bill of particulars which covered thirty-nine pages of the case on appeal. The particular point with which this appeal is concerned is the answer to the "10th" and "11th" demands. The "10th" required the defendant to state when and where he "ordered and/or demanded the goods mentioned in said contract;" and the "11th" whether the "order and/or demand" was in writing or oral, and if in writing, when and where made, and a copy thereof. In response to these demands the defendant stated:

"10. The defendant, for the Smart Set Specialty Clothing Co., Inc., ordered the goods and demanded them through the medium of the mail, addressed to Franklin Knitting Mills, 511-519 East 72d Street, and also at the said address by calling there personally and having Rose H. Meyerson call personally at the office.

"11. The said orders were in writing and the demands for their delivery were in writing and at times oral; the orders were addressed to the Franklin Knitting Mills, 511-519 East 72d Street, New York, and the demand, when in writing, was addressed to said address, and when oral was made either by the defendant herein or by Rose H. Meyerson at the plaintiff's address and was made to the President or Treasurer, and at times both, of the plaintiff corporation. Some of the orders and some of the demands are as follows:"

There followed copies of nineteen letters addressed to the Franklin Knitting Mills. When the defendant offered these letters in evidence the court, on the objection of the plaintiff, refused to receive them, on the ground that they referred to oral orders that had been theretofore placed, and refused to allow the defendant to testify to the oral orders because he was limited by a bill of particulars to written orders; and, of course, the defendant being unable to prove his counterclaim the court directed a verdict for the plaintiff. In this, I think, the learned trial judge was too technical; for, although many

of the letters did refer to orders that had been given theretofore, the orders were repeated in the written letters.

The respondent seeks to justify this ruling by citing cases that refer to oral contracts of sale where there has been a subsequent written confirmation. In such cases the courts have held that the oral agreement was the contract between the parties and that they were not limited by the terms of the written confirmation, but the contract was to be determined from the oral agreement. This rule is not, however, to be applied to orders. There can be only the one contract of sale, whereas there may be any number of repetitions of orders, each one of which would constitute in itself an order.

For this reason the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

CLARKE, P. J., LAUGHLIN, SMITH and GREENBAUM, JJ.,  
concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

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In the Matter of the Application of the PEOPLE OF THE STATE OF NEW YORK, by JESSE S. PHILLIPS, as Superintendent of Insurance, Appellant, Respondent, for an Order to Take Possession of the Property and Liquidate the Business of the CASUALTY COMPANY OF AMERICA.

In the Matter of the Claim of CLAUDE M. BADGLEY,  
Respondent, Appellant.

Miscellaneous Claim No. 1.

First Department, May 27, 1921.

**Corporations — liquidation of insurance corporation — subscription to new stock on false representations of president — transaction between claimant and president personal — claimant has no claim on assets, except as stockholder, where he accepted issued stock with knowledge.**

In proceedings to liquidate an insurance company it appeared that the claimant, who was a stockholder, wrote to the president personally, sending him a check to cover a subscription for fifty shares of a new

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issue of stock; that said check was sent in response to a personal letter from the president, who was a friend of the claimant; that the president's letter contained false representations as to the financial standing of the company, that the letter from the claimant specifically stated that he was sending the check to the president personally and on his guaranty that the stock would pay dividends as the president represented; that at the time the check was received all of the stock had been subscribed and fifty shares were purchased from another stockholder to fill claimant's order; that claimant knew he was not to receive new stock sometime before the certificates were issued, and that claimant's check was deposited to the credit of the insurance company and the stock transferred to the plaintiff was purchased with the company's check.

*Held*, that the claimant has no claim against the assets of the insurance company in the possession of the Superintendent of Insurance, except as a stockholder.

The company was not liable for the false representations of its president, since the transaction between the claimant and the president was purely personal and the company received no benefit therefrom.

In the use of the claimant's check to purchase issued stock of the new issue, the president was acting for the claimant, and by accepting it with knowledge that it was issued stock, the claimant ratified the act of the president.

APPEAL by Jesse S. Phillips, as Superintendent of Insurance, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of July, 1920, denying said appellant's motion to dismiss and disallow the claim of Claude M. Badgley.

Appeal by Claude M. Badgley from so much of said order as allows interest on said claim only to May 4, 1917, and fails to allow interest to date of payment, and in so far as it fails to allow preference for the full amount of claim and interest from January 3, 1916, to date of payment.

*Colin McLennan* of counsel [*Joseph P. Nolan* with him on the brief; *Clarence C. Fowler*, attorney], for the State Superintendent of Insurance.

*Michel Kirtland*, for the claimant Claude M. Badgley.

PAGE, J.:

On May 4, 1917, an order of liquidation was made, pursuant to which the Superintendent of Insurance took possession of

the property of the Casualty Company of America under section 63 of the Insurance Law (added by Laws of 1909, chap. 300, as amd. by Laws of 1912, chap. 217, and Laws of 1913, chap. 29; since amd. by Laws of 1918, chap. 119). The order contained an injunction against further proceedings in pending actions. At that time there was pending an action brought by Claude M. Badgley against the Casualty Company to recover the sum of \$1,250, with interest from January 3, 1916. Thereafter Badgley filed his claim with the liquidator, who in a report filed in June, 1918, disallowed the claim. Objection was filed to the rejection and a restatement of the claim made by Badgley. The issues raised by the report, objection and restatement of claim were referred to a referee to take evidence and report with his opinion. The referee reported with his opinion that the claim should be allowed for \$1,250, with interest from January 3, 1916, to May 4, 1917. Three hundred and twenty-nine dollars and fifty-two cents of the amount, with costs, was allowed as a preferred claim.

Claude M. Badgley and his wife were original subscribers to the stock of the Casualty Company on its incorporation in 1903, each taking 25 shares. In 1915 the capital of the company became impaired, and at a special meeting of the stockholders held December 29, 1915, it was voted to reduce the capital of the company from \$750,000 to \$562,500 by changing the capital stock from 7,500 shares of a par value of \$100 each to 22,500 shares of a par value of \$25 each. Subsequently it was voted to issue 7,500 shares of new stock at par, thus increasing the capital from \$562,500 to \$750,000. This reduction and increase became effective December 31, 1915, when it was approved by the Superintendent of Insurance, and on the same day subscriptions for the entire issue of new stock were paid in to the company.

On December 28, 1915, Mr. DeLeon, the president of the company, who for many years had been a friend of Mr. and Mrs. Badgley, wrote a personal letter to Mr. Badgley, in which he stated for Mr. Badgley's confidential information, referring to the proposed increase, "that it is more than likely that the stock will be placed upon an 8% dividend basis next year, and a semi-annual dividend of 4% declared in January, so that any new stock subscribed for by you will receive the first

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dividend next month. The company has never been in a more substantial and stronger position than at the present time, and will show at the end of the year total assets of over \$3,700,000; total reserves of over \$2,900,000, and a premium income of over \$3,500,000." The letter further stated the future policy of the directors in regard to paying substantial dividends out of profits and a stock dividend.

On December 31, 1915, Mr. Badgley answered with a letter from Boston, Mass., in which he stated that he had not considered subscribing for any new stock in the company, but that DeLeon's statement of facts had "put another phase to it," and then continued, "on your personal guarantee of the intentions of the Board as to going on an 8% basis and your assurance of the company's ability to do this and maintain it, I have decided to subscribe for the 50 shares that are Mrs. Badgley's and my allotment of the new stock. I enclose you herewith check for \$1,250 covering the amount. I am doing this solely on your personal recommendation, and in the hope that the additional amount at par will so help out our average that the total may eventually show us an even break as an investment. For this reason I am sending you the check, personally, leaving it in your hands. I do not want the investment unless you know it is going to turn out this way." The check inclosed, drawn to the order of the Casualty Company of America, was deposited to its credit in the Manufacturers' National Bank of Troy, N. Y. On January 3, 1916, DeLeon, as president of the company, wrote acknowledging the receipt of Badgley's letter "with check for \$1,250 subscription for fifty shares of new stock of the company."

When this check was received from Badgley all the new stock had been subscribed and paid for. Among those who had subscribed for the new stock was William Gow of Troy. The company drew a check to his order on the Manufacturers' National Bank of Troy for \$3,375, which included the \$1,250 subscribed by Badgley and the subscriptions of two others, delivered the check to Gow, and received from him certificates of the new stock which were transferred to several persons, and the twenty-five shares each were then transferred from Gow to Mr. and Mrs. Badgley.



DeLeon ceased his connection with the company in January, 1916. As a result of an examination of the company by the Insurance Department it was discovered that the capital of the company was still impaired, and on April 19, 1916, a stockholders' meeting was called to be held May fourth, for the purpose of reducing the capital stock from \$750,000 to \$300,000. Badgley received this notification and wrote to the then president, referring generally to representations that had been made to him at the time he took the new stock, which had never been lived up to and which subsequent events had proved were never intended to be. He then continued: "Therefore, I consider that the company have \$1,250 of my money, and I am prepared to turn back this stock and receive a check for it or have its equivalent in the stock about to be issued allotted to me." There ensued considerable correspondence. In a letter dated September 15, 1916, Badgley reiterated his claim for a return of his money or an equivalent amount of the new stock at \$10 per share. The general counsel of the company wrote Mr. Badgley on December 9, 1916, that the Insurance Department of the State of New York had forbidden the company to pay any claims pending further advices. On March 12, 1917, an action was commenced in the Supreme Court by the service of a summons with notice stating that judgment would be taken for \$1,250 with interest from January 3, 1916. Time to serve a complaint was extended until some time in May, and before the time expired the injunction order heretofore mentioned was served. We are, therefore, not informed of the cause of action that was to be alleged against the company in this action. As no tender of the stock had been made prior to the commencement of the action, the only remedy that would have been available to the plaintiff was in equity for a rescission. Tender of the stock is made in the claim filed with the Superintendent of Insurance and was also made upon the hearing before the referee.

It is unfortunate that the notice to stockholders of the proposed increase of capital stock which is referred to in Mr. DeLeon's letter to Mr. Badgley was not offered in evidence, so that the court could be advised of what knowledge Mr. Badgley had of the proposed transaction. It would appear

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that it had been arranged that the entire new issue would be underwritten and that the allotments to stockholders were to be made out of the stock issued to the underwriters, for the entire new issue of stock was authorized by the stockholders on December 29, 1915, and approved by the Superintendent of Insurance on December 31, 1915, and on the latter date not alone was the entire issue subscribed for, but the cash therefor was paid into the treasury of the company. If this plan was known to Badgley when he sent the check to DeLeon, there would be no force in his present contention that his check was to be applied on a subscription for new stock, and that the purchase of issued stock was unauthorized. Whatever was his knowledge on this subject before he sent the check, he was fully informed of the fact that the subscriptions for the entire issue of new stock were paid in to the company on December 31, 1915, by the letter of the treasurer of the company dated January 10, 1916, which was more than three weeks before the certificates of the new stock were delivered to him. Neither at that time nor at any time until this proceeding was brought did he make any objection that his check had been used to purchase the stock, and not as a subscription.

DeLeon used the company's bank account merely as a conduit through which the money was transmitted from Badgley to William Gow, a subscriber for the new stock, to purchase 50 shares thereof for Badgley. The company received no benefit from the transaction, and did not, therefore, become liable for DeLeon's false representations. DeLeon's letter in which the representations were made was a personal letter to Badgley and Badgley transmitted the check to DeLeon, not as president acting on behalf of the corporation, but as a personal friend in whom he reposed confidence, as appears from the extract heretofore quoted from the letter written by Badgley to DeLeon dated December 31, 1915: "I enclose you herewith check for \$1,250 covering the amount. I am doing this solely on your personal recommendation, and in the hope that the additional amount at par will so help out our average that the total may eventually show us an even break as an investment. For this reason I am sending you the check, personally, leaving it in your hands. I do not want the

investment unless you know it is going to turn out this way." In the use of the check to purchase issued stock of the new issue, DeLeon was acting for Badgley, and by accepting the stock Badgley ratified DeLeon's act.

Our conclusion, therefore, is that Badgley has no claim against the assets of the company in the possession of the Insurance Superintendent, except as a stockholder. If he has suffered damage by relying on DeLeon's representations, he must seek his redress from DeLeon. The order will, therefore, be reversed, with costs to the Superintendent of Insurance, and the claim dismissed, with costs.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ.,  
concur.

Order reversed, with costs and disbursements to the Superintendent of Insurance, and claim dismissed, with costs.

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J. HARVEY FINCH, Respondent, v. L. B. FOSTER Co., INC.,  
Appellant.

First Department, May 27, 1921.

**Pleadings — amendment of complaint on trial to conform to proof improper where amendment changes cause of action; also improper when proof received over defendant's objection — complaint alleging sale of goods to plaintiff and resale to third person and transfer of contract of resale to defendant with agreement for commissions — proof that defendant sold directly to third person inadmissible.**

Where it is alleged in the complaint that the defendant sold goods to the plaintiff, that the plaintiff resold the same goods to a third person, and that by an agreement between the plaintiff and the defendant the defendant was to fill said contract with said third person and pay to the plaintiff, as commission, the difference between the sale and resale price, but the proof on the trial was that the agreement for the sale of said goods to the third person was made directly between the defendant and said third person without the intervention of the plaintiff, it was improper to permit the plaintiff to amend his complaint on the trial to conform to the proof

since to do so would be to allege a substantially different cause of action; also improper when proof received over defendant's objection.

Under the allegations in the complaint it was error to admit evidence showing that the transaction was made directly between the defendant and the third person.

APPEAL by the defendant, L. B. Foster Co., Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of December, 1920, on the verdict of a jury, and also from an order entered in said clerk's office on the same day denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*I. Maurice Wormser* of counsel [*Jerome Wilzin*, attorney], for the appellant.

*Joseph Dannenberg* of counsel [*John T. McGovern*, attorney], for the respondent.

PAGE, J.:

The complaint contains two causes of action. The first alleges that on or about the 6th day of May, 1920, the plaintiff and defendant entered into an agreement whereby the defendant agreed to sell to the plaintiff 600 gross tons of steel rails at fifty-four dollars a gross ton, and that thereafter, on the same day, the plaintiff entered into an agreement with Manuel Caragol & Son, Inc., for the sale of the merchandise previously purchased by the plaintiff from the defendant for the sum of fifty-six dollars per gross ton, and the plaintiff, at the special instance and request of the defendant herein, turned over the said agreement to the defendant for the purpose of having the order filled, in consideration whereof the defendant herein promised and agreed with the plaintiff that the defendant would pay the plaintiff a commission of two dollars per gross ton; and that the defendant filled the order and shipped said merchandise amounting to 630 tons, and that the defendant is indebted to the plaintiff in the sum of one thousand, two hundred and sixty dollars.

The second cause of action alleges that on or about the 19th day of May, 1920, the defendant agreed to sell to the plaintiff 1,000 gross tons of steel rails at fifty-four dollars per

ton and the necessary spikes at four dollars per 100 pounds, and that thereafter the plaintiff resold said merchandise to Manuel Caragol & Son, Inc., at fifty-six dollars per gross ton, and it was thereafter agreed between the plaintiff and defendant that the plaintiff was to transfer his order from said Manuel Caragol & Son, Inc., to the defendant, and the defendant was to make an order direct with Manuel Caragol & Son, Inc., for said merchandise at fifty-six dollars per ton, together with the spikes at four dollars per 100 pounds, and in consideration thereof the defendant promised and agreed to pay the plaintiff two dollars per gross ton for all the merchandise shipped by the defendant to Manuel Caragol & Son, Inc., payment to be made when Manuel Caragol & Son, Inc., paid for the said merchandise; that thereafter Manuel Caragol & Son, Inc., entered into a contract with the defendant for the purchase of said merchandise at fifty-six dollars per gross ton, and that the total amount delivered amounted to 1,090 gross tons for which the defendant received payment, and that there became due two thousand, one hundred and eighty dollars. Judgment is demanded for three thousand, four hundred and forty dollars.

The indebtedness under the first cause of action was admitted and the money deposited into court after the commencement of the action. Over the objection and exception of the defendant's counsel the plaintiff was allowed to prove that on the seventh day of May when the contract was entered into for the resale of the 600 tons to Manuel Caragol & Sons, Inc., the defendant gave him a price on a further lot of 1,000 tons at the same price for Caragol, stating that Caragol was the plaintiff's customer and the defendant would protect him. It was proved that the agreement for the sale and purchase of the 1,000 tons of steel rails was made directly by the defendant with Manuel Caragol & Son, Inc., on the 20th day of May, 1920, without the intervention of the plaintiff at all. On the 24th day of May, 1920, plaintiff wrote to the defendant: "Please note that I have induced my customer, Messrs. Manuel Caragol & Son, Inc., to place an additional order with you for 1,000 tons of 80 pound rail, the same as covered by their order to you of May 7th, and ask that you protect me on this business, the same as on the 600 ton order."

The plaintiff was allowed to amend his complaint to conform to the proof, and has recovered judgment for the full amount claimed. The plaintiff's theory is that he was entitled to a commission of two dollars per ton for having effected the sale of 1,000 tons, pursuant to an agreement made on the 7th day of May, 1920. This is an entirely different cause of action from that alleged in the complaint, which was that the defendant had sold to the plaintiff 1,000 tons of steel rails on the 19th day of May, 1920, and that thereafter the plaintiff resold the same to Caragol at a profit of two dollars per ton and turned his contract over for execution to the defendant. The court did not have the power at Trial Term to allow an amendment to the complaint substantially changing the cause of action, nor did the court have the power to grant the motion to amend to conform to the proof which was received over the defendant's objection and exception. (*Grossman Mfg. Co., Inc. v. N. Y. C. R. R. Co.*, 181 App. Div. 764, 769.)

The evidence was improperly received. The plaintiff failed entirely to prove the second cause of action alleged in the complaint and the motion to dismiss made at the close of the plaintiff's case and at the close of the entire case should have been granted.

The second cause of action, therefore, should be dismissed and the judgment reduced to \$1,272, with interest and costs, and as modified affirmed, with costs to the appellant.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Judgment modified by dismissing second cause of action and reducing judgment to \$1,272, with interest and costs, and as so modified affirmed, with costs to appellant.

In the Matter of the Application of MYLES W. STANDISH,  
Respondent, for a Writ of Habeas Corpus to Bring up the  
Body of MARY ELIZABETH STANDISH, an Infant.

HAZEL SIMONS TRUITT, Appellant.

Second Department, May 13, 1921.

**Parent and child — habeas corpus by parent to secure child from guardian — court not limited to determining question of legal custody — final order of Virginia court in habeas corpus proceedings is res judicata — determination of Virginia court final though court reserved right to change custody under changed conditions — no change in condition shown authorizing change in custody.**

On the return of a writ of habeas corpus granted on the application of a father for the purpose of securing possession of his child who was held by its guardian, the court can exercise equity powers and make a decision depending not alone upon the question of legal custody but based upon the grounds of expediency and equity, and, above all, the interests of the child.

On an application for a writ of habeas corpus made by a father, it appeared that prior to the institution of the proceedings the father had instituted habeas corpus proceedings in the State of Virginia in which the respondent, the child's guardian, duly appeared though at the time thereof the guardian and the child, without the knowledge of the relator, were residents of this State, and the Virginia court after a hearing ordered that it was for the best interests of the child that it remain for the present in the custody and control of its guardian, but the court reserved the right to change the custody of the child when the situation of the parties made such change desirable.

*Held*, that the proceedings in Virginia were exactly like the present proceedings and were instituted in a court of competent jurisdiction, having unquestionable jurisdiction of the proceedings and the parties, and the final order in said proceedings is *res judicata* of the questions involved in the present proceedings, and said final order is entitled to full faith and credit in this State under section 1 of article 4 of the Federal Constitution.

There is no force in the relator's contention that there was a lack of jurisdiction in the Virginia court or that the proceedings were deprived of their conclusive character by the fact that the appellant was not then a resident of Virginia and her appearance was voluntary.

The determination of the Virginia court was final, notwithstanding the fact that it reserved the right to change the custody of the child when the situation of the parties made such change desirable.

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The relator has not shown by allegation or proof that the appellant is not as competent and is not in every way just as well fitted to care for the child at the time of the trial in the present proceedings as she was at the time of the Virginia trial, and so he did not establish that conditions have changed which would make it now proper to change the custody of the child, and, therefore, the order sustaining the writ of habeas corpus directing that the child be surrendered to the father was improperly granted.

APPEAL by Hazel Simons Truitt from an order of the Supreme Court, made at the Dutchess Special Term and entered in the office of the clerk of the county of Westchester on the 23d day of August, 1920, awarding the custody of the above-named infant to Myles W. Standish.

*Humphrey J. Lynch* [*William A. Sawyer* with him on the brief], for the appellant.

*Frederick P. Close* [*Lee Parson Davis* with him on the brief], for the respondent.

JAYCOX, J.:

The appellant is the maternal aunt of the infant Mary Elizabeth Standish, whose custody is in controversy in this proceeding. The relator resides in Detroit, Mich., where he married Mary Simons November 11, 1914. This marriage did not prove to be a happy one, and after a few months they separated. In October, 1915, while they were still separated, Mary Simons Standish gave birth to the above-mentioned infant. After the birth of said child the relator contributed nothing to her support or that of her mother, and in 1917 the mother of said infant instituted an action for divorce against the relator in the State of Michigan on the grounds of cruel and inhuman treatment, non-support and abandonment. Pending the trial of that action and against relator's opposition, an order was made directing him to pay one dollar per day for the support of his wife and child. He was compelled to pay this sum with difficulty. In November, 1917, a final decree of divorce was entered in said action, awarding the custody of the child to the mother and directing the relator to pay one dollar per day for the purposes above mentioned.

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Sometime thereafter the divorced wife took up her residence in Norfolk, Va., where she resided until her death, October 3, 1918. During this time the relator evinced no interest in his former wife or their child. He wrote to his former wife just once — to ask her to fill out a questionnaire in relation to the draft, his purpose being to show that he was obliged to contribute to the support of his former wife and child. Shortly prior to her death, Mrs. Standish married one John J. Carr, with whom she resided until she died. It was the mother's wish that her sister, the appellant, should have the custody of her child. Since the death of the mother the child has remained in the custody and control of her aunt and it is conceded that that is in every way a proper home and proper custody for the child. After the death of the mother, on the 10th day of October, 1918, an order was duly made appointing the appellant and John J. Carr guardians of said infant. The jurisdiction of the court and the legality of its action are expressly admitted. Thereafter, the relator went to Virginia and instituted in the Court of Law and Chancery of that State (it is stipulated that this is a court of competent jurisdiction, the same as the Supreme Court of this State) a habeas corpus proceeding to obtain the custody of said child. In obedience to the writ therein, said infant was produced in court and the proceedings duly and legally had therein. All the issues raised were tried and determined and the court made a decree therein wherein it determined "that it is best for the interest of said infant that it remain for the present in the custody and under the control of its aunt, Hazel Simons Truitt." The decree further provides that the father shall have reasonable opportunity of seeing his child. That decree is dated January 21, 1920, and there has been no appeal therefrom or application to modify the same although said decree contains this provision: "It is further ordered that these proceedings remain upon the docket of this Court in order that such further proceedings may be had or orders entered as the change of conditions in the life or requirements of said infant may dictate as best for her interest and welfare." Prior to the beginning of the last-mentioned proceeding the appellant had moved from the State of Virginia to Bronxville, in the State of New York. Apparently in the course of that proceeding the relator learned

of the change of residence of the appellant, and he then came to this State and on the 17th day of May, 1920, instituted this proceeding, a return was made, a traverse filed and the court proceeded to try and determine these questions: a. Whether under her appointment as guardian the appellant had the legal custody of said infant and, if so, could that custody be inquired into and any determination made in this proceeding as to the custody in which the interests of the infant would be best served. b. Were the Virginia habeas corpus proceedings *res adjudicata*? After a trial of these issues a decision was made awarding the custody of the child to the father.

The appellant urges the following reasons why the decree or order herein should be reversed: *First*, "Habeas corpus, being a legal remedy, will not lie to take a child from its legally appointed general guardian." The appellant's contention under this point is that habeas corpus is a legal remedy and in determining to whom the custody of this child shall be awarded the court cannot consider the welfare of the child but must be guided solely by the question of the legal custody, and that, as in this case, the aunt (appellant) has been appointed the guardian of the child, the writ must be dismissed. That the purpose and design of the writ is to relieve from illegal restraint and that there can be no illegal restraint where there is legal custody. The appellant's attorney cites many cases which he claims support his position, but the case upon which he places the most reliance and which apparently most strongly favors his contention is *People v. Wilcox* (22 Barb. 178). Quotations are made from this case which unequivocally assert all that appellant claims, but upon an examination of the whole opinion I think that the reason the learned judge did not exercise his chancery powers was not because upon the return of such a writ the court could not exercise equity powers, but because the writ was, in the first instance, returnable before a Supreme Court commissioner and, in the absence of such commissioner, was heard by a justice of the Supreme Court. In the course of his opinion the learned judge said: "I am entirely satisfied that upon this writ I possess no other powers than such as are possessed by a Supreme Court commissioner under the statute, and that

consequently I cannot, without a usurpation of authority, assume or exercise that species of jurisdiction which belongs exclusively to a court of equity."

Another case cited is *People ex rel. Pruyn v. Walts* (122 N. Y. 238). In that case (at p. 241) the court, by BROWN, J., said: "This case is very similar in its facts to *In re Welch* (74 N. Y. 299). There, as here, the contest was between the testamentary guardian appointed by the will of the father and those to whose custody the mother had committed the child. There, as here, the Special Term dismissed the writ, without prejudice to further proceedings, for reasons affecting the health and welfare of the child. This court dismissed the appeal, holding that such reasons justified the withholding the custody of the child from its legal guardian, and that the matter was one so purely within the discretion of the Special Term that its conclusions would not be reviewed." This is a clear, unmistakable holding that the court may, in a habeas corpus proceeding, consider the welfare of the child; in other words, exercise equity powers. The appellant, I think, misreads this opinion and interprets it as a dismissal of the proceeding upon legal grounds, with permission to renew for reasons affecting the health and welfare of the child. I do not so construe this opinion. The writ was dismissed for reasons affecting the health and welfare of the child, without prejudice to further proceedings. The Court of Appeals has recently had occasion to examine this question, and in *People ex rel. Riesner v. N. Y. N. & C. Hospital* (230 N. Y. 119, 124), by CARDOZO, J., when construing section 486 of the Penal Law, it said: "The writ of habeas corpus was limited in its origin to cases of restraint under color or claim of law (*N. Y. Foundling Hospital v. Gatti*, 203 U. S. 429, 438; *People ex rel. Pruyn v. Walts*, 122 N. Y. 238, 241). In time, however, it was extended to controversies touching the custody of children, which were governed, not so much by considerations of strictly legal rights, as by those of expediency and equity and, above all, the interests of the child [*N. Y. Foundling Hospital v. Gatti*; *People ex rel. Pruyn v. Walts*; *Matter of Knowack*, 158 N. Y. 482; *Matter of Waldron*, 13 Johns. 418; *The Queen v. Gyngall*, 1893, 2 Q. B. 232]. We find in this statute no suggestion of a purpose, if we were to assume that

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there was power (N. Y. Constitution, art. 1, sec. 4), to abridge the function of the writ in this field of its extension." In that case the removal of a child from legal to other custody for the benefit of the child was approved. I think, therefore, that the law is firmly established that upon the return of a writ of habeas corpus the court can exercise equity powers and make a decision dependent not alone upon the question of legal custody but based, as stated above, upon the grounds of expediency and equity and, above all, the interests of the child.

That brings us, then, to the determination of the question as to whether the decree of the Court of Law and Chancery of the State of Virginia awarding the custody of the child to its general guardian, the appellant herein, is *res adjudicata*. That proceeding, as recited above, was a proceeding exactly like this, instituted in a court of competent jurisdiction, having unquestionable jurisdiction of the proceeding and of the parties, and in it it was determined that the best interests of the child required her to remain in the custody of her aunt. The courts of this State have held that a decree or final order in a habeas corpus proceeding is an adjudication which may be pleaded as *res adjudicata*. (*Mercein v. People*, 25 Wend. 64; *Matter of Price*, 12 Hun, 508, 511; *People ex rel. Keator v. Moss*, 6 App. Div. 421; *Matter of Quinn*, 2 id. 103, 104; *People ex rel. Ludden v. Winston*, 34 Misc. Rep. 21; *affd.*, 61 App. Div. 614; *Matter of Lederer*, 38 Misc. Rep. 668; *People ex rel. Multer v. Multer*, 107 id. 58; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *Matter of Lee*, 220 id. 532, 538.) In *Mercein v. People* (*supra*) the court held: "An adjudication of a court of record or of an officer having authority to act in the matter on the question of the custody of an infant child brought up on habeas corpus, may be pleaded as *res adjudicata*, and is conclusive upon the same parties in all future controversies relating to the same matter, and upon the same state of facts." Under the Constitution of the United States, "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State" (U. S. Const., art. 4, § 1); and they shall have such effect in any court within the United States as they have, by law or usage, in the courts of the State from which they are taken. (See

Act Cong. May 26, 1790, being 1 U. S. Stat. at Large, 122, chap. 11; now U. S. R. S. § 905.)

I think there is no force in the respondent's contention that there was a lack of jurisdiction, or that the proceedings were deprived of their conclusive character by the fact that the appellant was not then a resident of Virginia and her appearance voluntary. Neither can the binding force of that decision be in any degree mitigated by claiming that the proceeding was not well tried. There was no occasion for the appellant to prove the law of the State of Virginia. In the absence of proof to the contrary, it is assumed to be the same as our own. (*Monroe v. Douglass*, 5 N. Y. 447; *Mount v. Tuttle*, 183 id. 358.)

The cases cited by the respondent are not applicable. They are cases where the infant was not before the court, or the appointment of a guardian made where the infant was brought into the jurisdiction of the court by trickery, such as *Matter of Hubbard* (82 N. Y. 90); *People ex rel. Winston v. Winston* (31 App. Div. 121). After citing these cases respondent says in his brief: "So in the case at bar, while the Virginia court obtained jurisdiction, it should never have entertained jurisdiction, as the infant was a resident of New York." We, of course, are not called upon to pass upon the propriety of the action of a court of a foreign State. If with jurisdiction it has acted, that action is binding upon us. The Special Term avoided the conclusive character of this action by holding that its determination was not final. The determination of the court was, "the Court is of the opinion that it is best for the interest of said infant that it remain for the present in the custody and under the control of its aunt, Hazel Simons Truitt." That was a final determination. It finally determined the question then before it, but recognized the fact that as the child grew older a different custody might be desirable; that the circumstances of the parties might change. It perhaps was an unnecessary precaution. It reserved the right to the court to change the custody of the child when the situation of the parties made such change desirable. It merely stated what the court undoubtedly had the power to do without any such reservation. Therefore, to justify this proceeding, the relator must show that there had

been a change of conditions so as to make the previous decision no longer applicable. In *Mercein v. People* (25 Wend. 64), at page 99, it is said: "According to adjudged cases, the proceedings before the chancellor were a bar to any re-investigation of any matters which occurred previous to the date of his final order. Such unhappy controversies as these may endure until the entire impoverishment or the death of the parties, renders their farther continuance impracticable. If a final adjudication upon a habeas corpus is not to be deemed *res adjudicata*, the consequences will be lamentable. This favored writ will become an engine of oppression, instead of the writ of liberty. An examination of the cases on this subject will show that the general rule laid down by Chief Justice DE GREY, in the case of the *Duchess of Kingston*, 11 State Trials, 261, as to the conclusiveness of a judgment of concurrent or exclusive jurisdiction upon the same matters between the same parties, is applicable to all final adjudications upon a habeas corpus."

The petition is barren of any allegation, there is no proof and the court does not find that the appellant is not as competent and is not in every way just as well fitted to care for this child at the time of this trial as she was at the time of the former trial. The court merely disagreed with the Virginia court as to in whose custody the best interests of the infant required her to be placed. The decision of the Virginia court must be deemed *res adjudicata* of the questions involved in this proceeding.

The order herein awarding the custody of the child to the relator should be reversed and the proceeding dismissed.

BLACKMAR, P. J., MILLS, RICH and PUTNAM, JJ., concur.

Order awarding custody of the child to relator reversed, and proceeding dismissed.

**KATHERINE H. HOMEYER, Respondent, v. HARRY YAUERBAUM  
Appellant.**

Second Department, May 20, 1921.

**False imprisonment — liability of store owner for acts of manager — manager did not act within his authority in arresting plaintiff — owner not responsible — evidence not showing that owner was informed of situation and took no action in relation thereto.**

The defendant, the owner of a store, is not liable to respond in damages to the plaintiff for false imprisonment, where it appears that during the absence of the defendant, the manager, solely upon suspicion that the plaintiff had stolen a handbag, accused her of the theft, forbade her to leave the store, threatened to search her and sent for the police, for the manager was not acting within the scope of his authority.

It cannot be presumed that a master, by intrusting his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do himself if present; the defendant would not if he had been present have been justified in arresting and detaining the plaintiff.

Evidence that some one telephoned or was directed to telephone the defendant that there was a woman in the store who would not leave, does not show that the defendant was informed of the situation and took no action in relation thereto, and the verdict for the plaintiff cannot be justified on that ground.

KELLY, J., dissents.

APPEAL by the defendant, Harry Yaverbaum, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 1st day of March, 1920, on the verdict of a jury, and also from an order entered in said clerk's office on the 19th day of February, 1920, denying defendant's motion for a new trial made upon the minutes.

*Abraham H. Kesselman*, for the appellant.

*James F. Nugent* [*Evan S. Webster* with him on the brief], for the respondent.

JAYCOX, J.:

The appellant keeps a store at the corner of Hamilton and Atlantic avenues, Richmond Hill, borough of Queens. The plaintiff went into the store on the evening of July 11, 1917. She saw the manager of the store, Meyer Yaverbaum, who is a brother of the defendant. At her request the manager showed her some small handbags and then stooped behind the counter to get others. Then, according to the plaintiff's story, he became excited and said there was a bag missing, forbade her to leave the store, threatened to search her and sent for the police. The evidence justified a finding that the plaintiff was put in duress and kept in the store; that she was humiliated and her feelings hurt by the implication that she had stolen the bag.

The serious question in the case is as to the responsibility of the defendant for what his manager did. The court charged the jury that if the defendant's brother (the manager) was in charge of the store, representing him, then the defendant would be responsible in the law for the action of his brother. It is not claimed that there was any evidence in the case justifying the charge that the plaintiff was guilty of larceny. The action of the defendant's manager was based solely upon suspicion. In *Mali v. Lord* (39 N. Y. 381) the Court of Appeals, per GROVER, J., said (at p. 384): " \* \* \* The inquiry is, whether a merchant, by employing a clerk to sell goods for him in his absence, or a superintendent to take the general charge and management of his business at a particular store, thereby confers authority upon such clerk or superintendent to arrest, detain and search any one suspected of having stolen, and secreted about his person, any of the goods kept in such store. If he does, he is responsible for such acts of the clerk or superintendent. If not, then such acts are not within the scope of the authority delegated to the superintendent, and the employer is not responsible therefor, for the reason that, while in their performance, the servant is not engaged in the business of the master, any more than in committing an assault upon, or slandering, a customer. In examining this question it must be assumed that, by the employment, the master confers upon the servant the right to do all necessary and proper acts for the protection and preser-



vation of his property, to protect it against thieves and marauders; and that the servant owes the duty so to protect it to his employer. But this does not include the power in question. It cannot be presumed that a master, by intrusting his servant with his property and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do himself if present. The master would not, if present, be justified in arresting, detaining and searching a person upon suspicion, however strong, of having stolen his goods, and secreted them upon his person. The authority of the defendants to the superintendent could not, therefore, be implied from his employment. The act was not done in the business of the defendants, and they were not, as masters, responsible therefor." This case seems to me to be controlling upon this appeal. The facts of the *Mali* case are almost identical with the facts in the case at bar. My attention has been called to no case in which that case has been overruled or its authority lessened in any way. It has been cited a number of times, but usually for the purpose of showing how the facts in that case differ from the facts of the case then under consideration, the principle of law enunciated in it not being criticized.

The respondent seeks to justify the verdict by claiming that this case is distinguishable because the defendant was informed of the situation and took no action in relation thereto. The evidence, however, does not bear out this contention. The evidence shows merely that some one telephoned or was directed to telephone the defendant that there was a woman in the store who would not leave. This gave the defendant no information or notice of the actual situation.

The respondent also claims that the instant case is controlled by *Craven v. Bloomingdale* (54 App. Div. 266) and *Lynch v. Metropolitan Elevated Railway Co.* (90 N. Y. 77). If I am correct in my conclusion that the facts in the *Mali* Case (*supra*) are closely analogous to this case, then the *Craven* Case (*supra*) is not an authority here because in the opinion in the *Craven* case it is pointed out that the facts in that case differ from the facts in the *Mali* case. In the *Lynch* Case (*supra*) it was held that the jury was justified in finding that the servant of the defendant acted with the

express authority of the defendant. I, therefore, cannot escape the conclusion that it is the duty of this court to reverse the judgment and to dismiss the complaint, with costs.

BLACKMAR, P. J., MILLS and RICH, JJ., concur; KELLY, J., dissents.

Judgment and order reversed and complaint dismissed, with costs.

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THE STANDARD CASING COMPANY, INC., Respondent, v. CALIFORNIA CASING COMPANY, INCORPORATED, Appellant.

First Department, May 20, 1921.

**Sales — contract for sale f. o. b. point of shipment to be paid for by sight draft after inspection is contract for goods to be delivered at point of destination — measure of damages for failure to deliver is difference in market price at point of destination and contract price plus freight — delivery of possession not made when goods delivered to carrier — objection to computation of damages by court cannot be taken on appeal where not raised below.**

A contract for the sale of goods to be shipped by the seller in San Francisco, f. o. b. to the buyer in New York city to be paid for by sight draft with bill of lading attached, with the privilege in the buyer of examining the goods on their arrival is a contract for goods to be delivered in New York city.

The measure of damages for the failure of the seller to deliver the goods according to the contract is the difference between the market price in New York city at the time when delivery should have been made and the contract price plus the freight charge from San Francisco to New York.

Delivery of possession of the goods to the seller under the contract was not made when the goods were placed on the cars f. o. b. San Francisco.

The fact that the court in computing the amount of damages for the purpose of directing a verdict failed to deduct the charge for freight, cannot be raised upon appeal where no objection was made or exception taken at the trial.

APPEAL by the defendant, California Casing Company, Incorporated, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county

of New York on the 13th day of December, 1920, upon the verdict of a jury rendered by direction of the court.

*McLaughlin, Russell & Sprague*, attorneys [*Frederick C. McLaughlin* of counsel], for the appellant.

*Kelley & Connelly*, attorneys [*M. E. Kelley* of counsel], for the respondent.

DOWLING, J.:

This action is brought to recover the sum of \$4,800 with interest, damages alleged in the complaint to have been sustained by plaintiff by reason of the breach of a contract between plaintiff and defendant, made on or about December 18, 1917, whereby defendant sold to plaintiff, to be delivered at its place of business in the borough of Manhattan, city of New York, twenty casks of salted pig guts, each cask to contain about 3,000 bundles of said guts, to be shipped by the defendant in San Francisco, Cal., f. o. b. to plaintiff in New York city, not later than March 15, 1918, at the agreed price of eighteen cents per bundle, to be paid by sight draft with the bill of lading for said goods attached, with the privilege to plaintiff of examining said goods on their arrival in New York, the plaintiff to pay therefor upon the delivery of the goods to it in New York. It is further alleged in the complaint that the agreement of the parties was duly confirmed by the defendant in writing and that the plaintiff has at all times been ready, able and willing to receive, accept and pay for the said goods upon their arrival in New York city, and has requested that defendant ship the same, and has performed all the conditions of the said agreement on its part to be performed; but that defendant has neglected and refused to ship said goods or any part thereof, and has repudiated and refuses to perform the contract, although performance has been duly demanded by plaintiff. Upon the trial plaintiff produced a letter of the defendant dated December 18, 1917, directed to the plaintiff at its office in the city of New York, wherein defendant stated that it had sold to the plaintiff the casks of merchandise in question to be shipped January, February and not later than March 15, 1918, at the price of eighteen cents United States gold coin per bundle, f. o. b. San Francisco.

The provision as to payment was "Sight Draft, Bill of Lading attached with the privilege of examining the goods on arrival." This contract tendered by defendant was accepted in writing by plaintiff.

Upon the trial plaintiff endeavored to prove the conversations between the representatives of the parties preceding the delivery of the written agreement, claiming that there had been an oral contract of which the written agreement was merely a memorandum. The question put to the witness Rado sought to elicit the arrangement made in the antecedent conversation as to the delivery of the goods, but objection was made to the receipt of this evidence by defendant's counsel upon the ground that the question called for parol evidence tending to vary the terms of the written instrument, and when the court said that from the written exhibits he inferred that the destination of the goods was New York city, defendant's counsel said, "We are not disputing that."

The breach of this contract by the defendant is not disputed. The question which is presented for consideration upon this appeal is whether it was error to permit proof of the market value of these goods in the New York market at the time when they should have arrived under the contract, which was the testimony offered by plaintiff, and whether it was also error to refuse to receive the testimony offered by defendant as to the market value of these goods in the San Francisco market. We have under consideration a contract which, under the concession made by the defendant upon the trial, called for the delivery of the goods in question in the city of New York, where payment therefor was to be made upon the presentation to plaintiff of a sight draft with bill of lading attached, but only after plaintiff had exercised its privilege of examining the goods on arrival. This was, therefore, a contract for goods to be delivered in New York city and that being the place where plaintiff was entitled to receive them, the value of the contract to it is to be fixed by the market price in New York of the goods when they were deliverable under the contract; and upon the breach of said contract by defendant by its total failure to deliver any of the goods in question, the damage sustained by the plaintiff was the difference between the purchase price of the goods, as

fixed by the contract, plus the freight charge to New York, and the market price in New York city at the time mentioned. The provision fixing the price f. o. b. San Francisco did not change the place of delivery nor alter the measure of damages as between the parties. Delivery of possession of these goods to the plaintiff under this contract was not made when the goods were placed on the cars f. o. b. San Francisco. As was said in *Boss v. Hutchinson* (182 App. Div. 88, 90): "In the light of the other facts, this merely means that the goods were to be placed on the cars at Pittsford free of expense to the purchaser and that the expense of transportation was to be borne by the purchaser. That it was not intended that that should constitute a delivery of possession appears from the fact that a draft should be drawn with inspection allowed. If, on inspection, the goods were not according to contract, the purchaser would have had the right to reject them and without payment of the draft he could not take them. The delivery was, therefore, not contemplated to have been made at the shipping point." The only difference between the case just cited and the present case is that the former was a stronger case in favor of the seller, as there had been a cash payment in advance.

Under the facts in this case the plaintiff's measure of damage was the market price in New York at the time of delivery, as has been said, less the contract price plus the freight charge to New York. The appellant now calls attention to an error in computing the amount of damage. The learned trial court directed a verdict in this case, taking as the basis for an award the difference between the contract price of the goods, eighteen cents a bundle, and the lowest market price in New York at the time in question as testified to by the plaintiff's witnesses, namely, twenty-five cents a bundle. In making the computation no deduction was made for the freight charge from San Francisco to New York, which would have been an element in arriving at the damage and which should have been deducted from the amount in question. But no exception was taken at the trial to the failure to deduct this amount, nor was the attention of the court in any way called to this oversight either by objection, exception or motion. It is too late, therefore, to raise the question for the

first time upon this appeal, since, if the matter had been properly brought to the notice of the court, or of plaintiff's counsel, the objection could have been met, either by supplying proof of the amount of the freight charge or by furnishing a reason why that charge should not be deducted in this case.

The judgment appealed from will, therefore, be affirmed, with costs.

CLARKE, P. J., SMITH, MERRELL and GREENBAUM, JJ.,  
concur.

Judgment affirmed, with costs.

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THOMAS W. ROURKE, Respondent, v. ROBERT S. BICKLEY,  
Appellant.

Second Department, June 3, 1921.

**Principal and agent — action to recover for services rendered to defendant in purchase of house — recovery cannot be had on theory that defendant interfered with plaintiff's claimed right of recovery against seller.**

The only cause of action set forth in the complaint was for services rendered the defendant in the purchase of a house, and it was error, therefore, for the court to charge the jury on the theory that the action was brought to recover the amount of commissions which the plaintiff claimed the defendant prevented him from receiving from the seller of the property.

APPEAL by the defendant, Robert S. Bickley, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 19th day of November, 1920 upon the verdict of a jury, and also from an order entered in said clerk's office on the 2d day of December, 1920, denying defendant's motion for a new trial made upon the minutes.

*Martin J. Birmingham*, for the appellant.

*Frederick W. Sparks*, for the respondent.

PER CURIAM:

The only cause of action set forth in the complaint is for services rendered the defendant in the purchase of a house. The plaintiff, however, in addition to the allegations necessary

to set forth that cause of action, has included a number of unnecessary, immaterial and irrelevant allegations which seem to indicate that the plaintiff thought his cause of action arose from some interference of the defendant with the plaintiff's claimed right of recovery against the seller of the house. These allegations were apparently urged at the trial with such force and vigor that they impressed the trial judge as setting forth the real cause of action. The court charged the jury that the action was brought to "recover the amount of commissions which the plaintiff says he was prevented from earning. \* \* \* The plaintiff says it is a rule in real estate transactions in the city that where a man gets a customer and goes to the owner, and as the result of presenting that customer to the owner a sale is perfected, the owner pays the commission. \* \* \* Did the acts of the defendant \* \* \* deprive the plaintiff of the fruits of his labors, that is to say, the amount that he should have received, namely, \$1,035?"

The jury's verdict in favor of the plaintiff was plainly based upon a cause of action not pleaded.

The judgment and order must be reversed and a new trial granted, with costs to abide the event.

BLACKMAR, P. J., MILLS, RICH, PUTNAM and JAYCOX, JJ.,  
concur.

Judgment and order reversed and new trial granted, costs to abide the event.

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In the Matter of T. JOHN McKEE, an Attorney.

Second Department, June 10, 1921.

**Attorney and client — attorney suspended from practice for using funds of client, an administrator, in his personal business — consent of father of decedent and acquiescence of administrator no excuse.**

An attorney at law was properly suspended from practice for a period of two years, where it appeared that he used the proceeds received on behalf of his client, an administrator under limited letters, for his own personal business.

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Second Department, June, 1921.

The fact that the father of the decedent, who had no interest in the fund, consented to the use of the money and that the administrator also acquiesced, is no excuse for nor palliation of the attorney's misconduct.

DISCIPLINARY proceedings instituted by the Brooklyn Bar Association.

*Mortimer W. Byers*, for the motion.

*Edward Ward McMahon*, opposed.

BLACKMAR, P. J.:

The report of the official referee should be confirmed. The respondent, a member of the bar, had received a thorough education at college and in law school and was presumably acquainted with the proper ethical standards of the profession. His client, the administrator under limited letters; the widow, who was entitled to the avails of the action; and her relatives and advisers were persons of no education and some of them illiterate. For these reasons the duty of the respondent to safeguard their interests was the more imperative. He took from the administrator a retainer of thirty-five per cent of the amount recovered or realized upon settlement. For this he cannot be criticized although he well knew that the amount was subject to the approval of the surrogate on the settlement of the administrator's account. The case was settled, and the avails, amounting to \$3,250, came into the respondent's possession. He deposited the money in his own private bank account, and subsequently drew it out and used it in the prosecution of a business which he was carrying on in addition to the practice of the law. This was a gross violation of the duty that he owed to his client. At the time he used the money he had no expectation of repaying it except through the uncertainty of an award for park purposes in Philadelphia and an undivided interest in real property in Philadelphia and in Washington, and the prospects of a business in which at that time, according to his own testimony, the liabilities equalled the assets. The fact that the father of the decedent acquiesced in respondent's using the money is no excuse for nor palliation of his misconduct. It was the duty of the attorney to see that the fund was properly safeguarded, and he cannot



shield himself behind the consent of the father of the decedent, who had no interest in the fund, or the acquiescence of the administrator, who had no right to consent to its diversion and who appears to have been ignorant of his own duties and of the rights of his daughter, the beneficiary. Fortunately the respondent, after a long delay, and after his client was compelled to retain and pay a lawyer, was able to make restitution, although this appears to have been done without the approval of the surrogate of the expenses that had been incurred by the administrator, or of the amount of his own fee.

The report of the official referee should be confirmed, his recommendation adopted, and the respondent suspended from the practice of his profession for a period of two years from the date of entry of this order.

MILLS, RICH, PUTNAM and JAYCOX, JJ., concur.

Report of official referee confirmed, his recommendation adopted, and respondent suspended from the practice of his profession for a period of two years from the date of entry of the order herein.

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J. HERBERT BATE, Appellant, v. BRENACK STEVEDORING COMPANY, INC., and Others, Defendants, Impleaded with WILLIAM J. MAHON, Respondent.

Second Department, June 10, 1921.

**Mortgages — foreclosure — Federal receiver of property of defendant corporation not entitled to be made party defendant — receiver had no interest in subject of action — making receiver party was abuse of discretion of court.**

A Federal receiver who was appointed as custodian simply of the property of a corporation defendant and who did not acquire title to the corporation's property has no interest in the subject-matter of an action to foreclose a mortgage on the real property of the corporation, within the meaning of section 452 of the Code of Civil Procedure, and is not, therefore, entitled to intervene as a matter of right.

Neither is there any justification in making him a party in the exercise of the discretion of the court, where there does not appear to be any defense to the action or that the corporation is neglecting its duty in defending the action.

APPEAL by the plaintiff, J. Herbert Bate, from an order of the County Court of Kings county, entered in the office of the clerk of the county of Kings on the 4th day of May, 1921, permitting a receiver, upon his application, to be made a party to a foreclosure action, and directing that the summons be amended accordingly, and giving the receiver the right to interpose an answer.

*Adelma H. Burd*, for the appellant.

*John B. Knox* [*Edward Ward McMahon* with him on the brief], for the respondent.

BLACKMAR, P. J.:

The receiver was appointed as custodian of the property simply, with such powers as the United States court that appointed him conferred upon him. The title of the property remained with the defendant corporation, and the receiver, therefore, had no interest in the subject of the action or in the real property within the meaning of section 452 of the Code of Civil Procedure, which, as we understand it, means a property interest. He is, therefore, not entitled to intervention as a matter of right. Neither is there any justification for making him a party in the exercise of the discretion of the court, for the petition alleges no facts from which the conclusion can be drawn that there exists any defense to the action, or that the corporation itself is neglecting its duty in defending the action. There exists, therefore, no ground for making the receiver a party. (*Honegger v. Wettstein*, 94 N. Y. 252.)

The order of the County Court of Kings county should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

MILLS, RICH, PUTNAM and JAYCOX, JJ., concur.

Order of the County Court of Kings county reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

EMILY DAVIES, Respondent, v. HUBERT A. JAGGER and THE  
VILLAGE OF SOUTHAMPTON, Appellants.

Second Department, June 10, 1921.

**Villages — action to recover damages for injuries to trees, plants, shrubs and other vegetation on plaintiff's land caused by sea water passing through cut made by defendant in natural barrier — village liable for nuisance — measure of damages is cost of replacing trees, etc. — permission to appeal to Court of Appeals granted because of doubt as to proper measure of damages.**

The defendant village is liable to the plaintiff for the injuries caused to plaintiff's trees, plants, shrubs and other vegetation by sea water which overflowed plaintiff's land through a cut or opening made by the defendant in a natural barrier which held back the tides, which cut or opening was not adjoining plaintiff's land but was about 250 feet therefrom.

*It seems*, that it was proper to permit the plaintiff to recover compensation for the money required to replace the trees, plants, shrubs and other vegetation.

However, as there is considerable doubt as to the proper measure of damage in such a case permission is granted to appeal to the Court of Appeals.

MOTION for leave to appeal to the Court of Appeals from an order of this court, filed on April 22, 1921, affirming a judgment in favor of plaintiff, entered in the office of the clerk of the county of Suffolk on the 14th day of October, 1919, upon the verdict of a jury, and an order denying defendants' motion for a new trial, in an action to recover damages for the wrongful destruction of shrubs and other vegetation planted on plaintiff's property, alleged to have been caused by reason of defendants' permitting a cut or opening to be made through certain sand dunes lying at the foot of Cooper's Neck lane in the village of Southampton, and forming a natural barrier against the ocean tides.

*Harri M. Howell* [T. M. & R. P. Griffing and P. L. Housel with him on the brief], for the motion.

*Joseph Wood*, opposed.

RICH, J.:

Plaintiff is the owner of premises situated at the northeast corner of Meadow lane and Cooper's Neck lane in Southampton, N. Y., which are improved by a residence and numerous shrubs, plants and trees, which were laid out by a landscape gardener. The premises were also surrounded with a privet hedge, six to eight feet in height, which had been growing on the premises for at least thirty years prior to the destruction.

It appears that defendant's highway superintendent was employed to cart sand from the foot of Cooper's Neck lane for use on the village highways, and for this purpose a cut or opening was made at his direction in the sand dunes at the foot of the lane in October and November, 1916. On September 4 and 5, 1918, salt water from the ocean penetrated through the cut or opening made by defendant, as a result of which plaintiff's lawns, trees and shrubs, together with some 600 feet of the privet hedge, were destroyed. Plaintiff was not an abutting owner on that portion of Cooper's Neck lane where the cut in the dunes was made, her land being about 250 feet from the cut or opening. The land to the west of Cooper's Neck lane is lower than plaintiff's premises, sloping westward about three-quarters of a mile to Taylor's creek and Shinnecock bay. These dunes and a sand bar were a natural barrier protecting the land behind them, and it appears to have been the custom to place brush where it would collect sand and build up the dunes, to protect the land in the rear.

The trial court has correctly held that the present action may be maintained on the authority of *Carll v. Village of Northport* (11 App. Div. 120, 122). That the appellant, although a municipal corporation, is not immune from legal responsibility for the creation of a nuisance is beyond question. (*Herman v. City of Buffalo*, 214 N. Y. 316, 318.) The theory upon which the present action is brought is nuisance. Respondent does not claim damages by reason of a change in grade of the highway, but rather because of defendant's act in causing a cut or opening to be made in the sand dunes, whereby salt water was permitted to run over and upon her land. It is true that the sand taken from the dunes was used to raise the grade of certain highways, although it also appears that a stone wall was constructed across Halsey's Neck lane

to stopgap the openings made in the sand dunes at that point, with the object in view of preventing the salt water from undermining the road. But it does not appear that any similar precaution was taken or a barrier erected in the place where the openings were made at the foot of Cooper's Neck lane, through which the water came which destroyed plaintiff's plants and shrubbery.

The learned court charged the jury that the plaintiff, if entitled to any damages at all, is entitled to such sum as represents the fair and reasonable value of the trees, plants and shrubs and other vegetation, together with the cost of transportation and labor necessary to replace such as were permanently injured.

It is contended by the learned counsel for the appellants that the proper measure of damages, if plaintiff is entitled to damages, is the difference in value of the property before and after the injury.

There is no claim for damages to the realty; the shrubs were pleasing to the eye and they had a value only because they were good to look upon, and I think it was proper to permit the plaintiff to recover compensation for the money that it would require to replace them. However, after a careful examination of the authorities cited by counsel upon the question as to the proper measure of damages in such a case, we feel that in the interests of justice this motion ought to be granted.

Motion for leave to appeal to the Court of Appeals granted.

BLACKMAR, P. J., MILLS, PUTNAM and JAYCOX, JJ., concur.

Motion for leave to appeal to the Court of Appeals granted.

INDESTRUCTIBLE METAL PRODUCTS CO., INC., Respondent,  
v. JOSEPH SUMMERGRADE, Appellant.

First Department, June 3, 1921.

**Trial** — motion in Supreme Court action for sum of money only to stay trial of action in Municipal Court of City of New York between same parties and involving same subject-matter — order which does not provide for undertaking under Code of Civil Procedure, § 611, is improper — order cannot be made in one action staying trial of another action — remedy is by action for injunction.

In an action in the Supreme Court in which the plaintiff demands a money judgment only and seeks no injunctive or other relief, an order granting plaintiff's motion to stay the trial of an action brought by the defendant in the Municipal Court in the City of New York upon the ground that the present action was begun prior to the Municipal Court action and involves the same subject-matter must be reversed for two reasons: *First*, that it contains no provision requiring the plaintiff to execute an undertaking as provided in section 611 of the Code of Civil Procedure; and *second*, that the plaintiff cannot upon motion made in one action obtain an order staying the trial of another action; his remedy is to bring an action for an injunction.

**APPEAL** by the defendant, Joseph Summergrade, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of February, 1921, granting plaintiff's motion to stay the trial of an action brought by the defendant in the Municipal Court of the City of New York Borough of Manhattan, First District, upon the ground that this action was begun prior to the Municipal Court action and involved the same subject-matter.

*Copal Mintz* of counsel [*Israel N. Thurman*, attorney], for the appellant.

*Emanuel Sustick* of counsel [*Bernard Fliashnick*, attorney], for the respondent.

GREENBAUM, J.:

This is an action at law in which the plaintiff demands a money judgment only and seeks no injunctive or other relief. Although the order appealed from provides that the "defendant, his attorney or agent, be and they are hereby stayed from proceeding with the trial of the action commenced by the said defendant against the plaintiff herein in the Municipal Court, Borough of Manhattan, First District," it is in effect an injunction granted in one action to stay the trial of another action between the same parties.

The order must be reversed for two reasons: *First*, that it contains no provision requiring the plaintiff to execute an undertaking as provided in section 611 of the Code of Civil Procedure; and *secondly*, that although a party seeking to stay a trial may move in the action sought to be stayed without giving security as required by section 611 of the Code, he cannot upon motion made in one action obtain an order staying the trial of another action. His remedy in the latter case is to bring an action for injunction. This has been held in numerous cases.

In *Belasco Co. v. Klaw* (98 App. Div. 74) the court said: "The inherent power of the court to stay proceedings or control the trial of an action is one which must be exercised in the action itself, and where it is sought to enjoin parties from proceeding in another action such relief must be by injunction in an action where by formal prayer it is demanded." (Code Civ. Proc. § 611.)

The opinion in *Grammer v. Greenbaum* (146 App. Div. 3) reads in part as follows: "This court has several times said that the trial of an action cannot be stayed in this way. The power of the court to stay proceedings or control the trial of an action is one which must be exercised in the action itself (*Raymore Realty Co. v. Pfotenhauer-Nesbit Co.*, 139 App. Div. 126; *North Central Realty Co. v. Blackman*, 145 id. 199), and where it is sought to enjoin parties from proceeding in another action, such relief must be by injunction in an action where such relief is demanded in the complaint. (*Belasco Co. v. Klaw*, 98 App. Div. 74; *Webster v. Columbian National Life Ins. Co.*, 131 id. 837; *affd.*, 196 N. Y. 523.) Under the authorities cited the court could not, by an order in this

action, stay the trial of the City Court action. Nor could it enjoin the prosecution of that action by an order in this, because no such relief is demanded in the complaint."

The order must be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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JAMES DILLON, Respondent, v. TRUSTEES OF ST. PATRICK'S  
CATHEDRAL IN THE CITY OF NEW YORK, Appellant.

Second Department, June 17, 1921.

**Workmen's Compensation Law — when charitable corporation maintaining cemetery is engaged in business for pecuniary gain — gravedigger engaged in hazardous employment — action by gravedigger to recover for injuries received in making excavation for monument foundation — contributory negligence and assumption of risk no defense — evidence presenting question for jury as to defendant's negligence.**

A charitable corporation which maintains a cemetery and which sells burial privileges and devotes the money so raised to the expenses of running the cemetery, and for religious and educational purposes, and for charity consisting primarily in providing graves for those unable to pay for them, is engaged in a business or occupation for pecuniary gain within the meaning of subdivision 5 of section 3 of the Workmen's Compensation Law.

A gravedigger, working for said corporation, who was injured while making an excavation for a monument foundation was engaged in a hazardous employment within the meaning of section 2, group 13, of the Workmen's Compensation Law.

Accordingly, in an action against the corporation it could not interpose the defense of contributory negligence and assumption of risk, for it had not secured compensation for its employees as provided in section 50 of the Workmen's Compensation Law.

It appeared that the plaintiff was injured while excavating for a foundation for a monument by the caving in of the sides of the excavation, that



shortly before the injury defendant's superintendent examined the excavation and that it was the custom, sometimes, to shore up excavations of the depth of the one in which the plaintiff was injured. On all the evidence, *held*, that a question as to defendant's negligence in omitting to provide for shoring up the work was presented for the jury.

APPEAL by the defendant, Trustees of St. Patrick's Cathedral in the City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 4th day of December, 1919, upon the verdict of a jury for \$3,000, and also from an order entered in said clerk's office on the 15th day of December, 1919, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*Timothy A. McCarthy*, for the appellant.

*George M. Curtis, Jr.* [*Moses Cohen* with him on the brief], for the respondent.

BLACKMAR, P. J.:

The defendant is a charitable corporation which maintains a cemetery, called the Calvary Cemetery. It sells burial privileges and devotes the money so raised to the expense of running the cemetery, for religious and educational purposes, and for charity—primarily in providing graves for those unable to pay for them.

On the 26th of April, 1918, the plaintiff, a gravedigger in the employ of the defendant, was directed to make an excavation for the foundation of a monument, and while so engaged, when he had dug to a required depth of about nine feet, the earth fell upon him and injured him severely.

The learned trial justice held that the question of contributory negligence and assumption of risk were not in the case, for it was conceded that defendant had not secured compensation for its employees as provided in section 50 of the Workmen's Compensation Law. The question is thus raised whether the relations between the defendant and the plaintiff fall within the Workmen's Compensation Law. If they do, the charge was correct (Workmen's Compensation Law, § 11); if not, it was erroneous.

Excavation and grave digging are classified by the Workmen's Compensation Law as a hazardous employment. (§ 2, group 13 of the law.) But compensation is provided for "employment only in a trade, business or occupation carried on by the employer for pecuniary gain, or in connection therewith." (§ 3, subd. 5 of the law.) The work, therefore, was hazardous, but was the employment in a trade, business or occupation carried on by the defendant for pecuniary gain? The employer by selling burial privileges does secure a pecuniary gain. The proceeds of the gain, however, are devoted entirely to the purposes of the cemetery and to charitable work. *Matter of Uhl v. Hartwood Club* (221 N. Y. 588, affg. 177 App. Div. 41) seems to hold that such an employment is within the act. The defendant in that case was a country club. It owned a piece of woodland and was accustomed to carry on forestry operations. This resulted in a profit, which was applied solely to maintaining the club for the benefit of its members. The deceased was a lumberman engaged in cutting wood for the market. It was held that the claimant, his widow, was entitled to compensation under the Workmen's Compensation Law, that the work was hazardous, that the employment was in a business carried on for pecuniary gain, and that the question of the disposition made of the gain by the defendant was immaterial. The principle underlying that decision is applicable to the pending case. The country club carried on lumbering on its premises, and it made a gain by the lumbering and devoted the money to the maintenance of the club. In this case the defendant company carries on the business of selling burial lots for gain and devotes the gain to maintaining the cemetery and to religious and charitable purposes. The work is hazardous within the definition of the statute; the employment of preparing the lots for monuments or for burial is carried on by the defendant for pecuniary gain; and it is a matter of no importance to what purpose this pecuniary gain is devoted. I, therefore, reach the conclusion that no error was made by the court in charging the jury that the question of assumption of risk and contributory negligence was not in the case.

We now approach the question whether there was negligence on the part of the defendant. In considering this we eliminate

all questions of contributory negligence and of assumption of risk. No matter how negligent the plaintiff was, no matter whether under the rule of law generally applicable he assumed the risk of his work, nevertheless if there was any negligence on the part of the defendant in properly caring for and safeguarding the plaintiff, which was a proximate cause of the injury, it is liable.

It is a well-established principle of law that the rule requiring an employer to furnish his servants with a safe place to work has no application where the employee engages in creating the place which is unsafe because of the very work that he is doing. (*McDonough v. Clonbrock Steam Boiler Co.*, 113 App. Div. 432; *Bertolami v. United Engineering & Contracting Co.*, 120 id. 192.) But this principle does not aid in solving the question under consideration, for that rule rests upon considerations of the assumption of risk and contributory negligence and sometimes upon the fact that there is no element of negligence of the defendant which enters in. (*Henry v. Hudson & Manhattan R. R. Co.*, 201 N. Y. 140.) The plaintiff began digging the excavation on the twenty-fourth of April, a Saturday. He was instructed to carry the excavation to a depth of nine feet. He stopped work Saturday afternoon. It rained Sunday and Sunday night, and he went back to work on Monday morning about seven o'clock. The soil was composed of loam and gravel. The superintendent of the defendant, going his rounds that morning, stopped where the plaintiff was working, because, as he said, he was considering the question whether the work was safe under the circumstances. He looked at it. It seemed to him to be safe. He asked the plaintiff, who was nearly nine feet down, whether everything was all right, and the plaintiff said, "Yes." About ten o'clock the earth caved in and fell upon plaintiff, and a large stone struck him on the shoulder and injured him severely. It was the custom, sometimes, to shore up the excavation when going down to that depth, and many times during a number of years the graves had been known to cave in in the process of excavation. The superintendent of another cemetery testified that, considering the nature of the soil, it was dangerous to excavate to that depth without shoring up. A question of defendant's negligence in omitting to provide

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for shoring up the work was, therefore, presented to the jury.

The judgment and order should be affirmed, with costs.

Present — BLACKMAR, P. J., MILLS, PUTNAM, KELLY and JAYCOX, JJ.

Judgment and order unanimously affirmed, with costs.

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JOHN H. COOPER, Respondent, v. ROLAND R. CONKLIN,  
Appellant.

Second Department, June 17, 1921.

**Attorney and client — account sent by attorney to client for services — account stated may consist of single item for services rendered — contracts between attorney and client — Judiciary Law, § 474, construed — failure of client to reply to bill for services does not make it an account stated — proof which assignee of attorney must make.**

An account sent by an attorney to his client consisting of a single item for services rendered in an action is one which, so far as its form is concerned, may, by acquiescence of the client, become an account stated.

The provision of section 474 of the Judiciary Law to the effect that the compensation of an attorney is governed by agreement, express or implied, which is not restrained by law, applies only to contracts that are made before the services are entered into, and not to those made during the relationship of attorney and client.

As to a contract made between an attorney and his client subsequent to the employment which is beneficial to the attorney, it is incumbent upon the attorney to show that the provisions are fair and reasonable and were fully known and understood by the client.

This rule of law is applicable to a contract which is a result of the implied acceptance by the client of an account rendered by the attorney for the value of his legal services.

Accordingly, where an attorney, pending the existence of the relationship of attorney and client, renders an account to his client it does not become an account stated by the failure of the client to object thereto, and in an action thereon by the assignee of the attorney the assignee must prove not only the rendition of the bill and the client's acquiescence therein, but also that the compensation was fair and reasonable for the services

rendered and that the client had such full knowledge of the nature and extent of the services rendered him as to be capable of exercising a fair judgment as to the reasonableness of the bill.

APPEAL by the defendant, Roland R. Conklin, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 25th day of January, 1921, upon the verdict of a jury, and also from an order entered in said clerk's office on the 2d day of February, 1921, denying defendant's motion for a new trial made upon the minutes.

*Achilles H. Kohn* [*Silas H. Dayton* with him on the brief], for the appellant.

*Harold E. Lippincott*, for the respondent.

BLACKMAR, P. J.:

The action is upon an account stated. The plaintiff's assignor was an attorney at law for the defendant in an action entitled *Conklin v. Shonts*. On the 27th day of April, 1920, he wrote to the defendant inclosing a bill for professional services, in the following words:

" April 27, 1920.

" *Conklin vs. Shonts*

" Roland R. Conklin

" to

" Arthur C. Hume, Dr.

" Balance due for legal services, etc., in this

action, to date..... \$2,600 00

" Received payment."

It was competent for the jury to find, and we must assume that they did so find, that defendant paid no attention to the letter or bill for five months. On September 29, 1920, the plaintiff's assignor having assigned his claim to the plaintiff, this action was brought thereon, and the complaint declared upon an account stated. Judgment went for the plaintiff, and the defendant appeals.

It has been held that in cases where prices are not agreed

upon, or where they are not fixed by the market, but depend solely upon the value of personal services to be determined on the principle of *quantum meruit*, the general rule relating to accounts stated does not necessarily prevail. (*Burlingame v. Shel mire*, 35 N. Y. St. Repr. 161; 59 Hun, 615.) This proposition seems to rest for its support on the following expression found in the opinion of *Williams v. Glenny* (16 N. Y. 389): "But I do not think a claim for a round sum, where the subject of the demand is one which would naturally consist of many items, is in the nature of an account." There is authority, however, that an account stated may consist of a single item. (*Stein v. Stein*, 140 App. Div. 306; *Little v. McClain*, 134 id. 197; *Benjamin v. Levy*, 176 N. Y. Supp. 454; 1 C. J. 682.) In the pending case, except for the disbursements which seem to be included in the account rendered in the letters "etc.," the claim is not one that presumably consists of a number of items. It is a claim for the value of services performed in a single action, which may properly be stated by a sum in gross, and there is no obligation upon an attorney to divide his charge and specify the amounts assigned to the several items of work in the same case. I think, therefore, that the account rendered is one which, so far as its form is concerned, may, by the acquiescence of the defendant, become an account stated. But there is an administrative rule of law growing out of the relations between plaintiff's assignor and the defendant, which prevents the affirmance of the judgment.

Contracts between an attorney and his client, which are favorable to the attorney and are made during the relationship between the parties, stand upon a different basis from ordinary contracts between persons who deal at arm's length. The provision of the Judiciary Law, section 474, to the effect that the compensation of the attorney is governed by agreement, express or implied, which is not restrained by law, applies only to contracts that are made before the services are entered into, and not to those made during the relationship of attorney and client. (*Whitehead v. Kennedy*, 69 N. Y. 462.) The doctrine is stated by Mr. Justice LAUGHLIN in *Boyd v. Daily* (85 App. Div. 581) as follows: "The general rule is that as to contracts made between the attorney and client subsequent

to the employment which are beneficial to the attorney, it is incumbent upon the latter to show that the provisions are fair and reasonable and were fully known and understood by the client." To the same effect are *Whitehead v. Kennedy* (*supra*); *Wood v. Downes* (18 Ves. Jr. 119), and *Brauer v. Lawrence* (165 App. Div. 8). The rule is a just one and imposes no unreasonable burden upon the attorney. The underlying reason for the rule is that the relations between attorney and client are so confidential and the client relies so fully upon his attorney for the protection of his legal rights and is by the nature of their relations so subject to the advice of the attorney that in all such contracts the attorney cannot rely upon the face of the agreement itself, but is compelled by the law to show, in addition thereto, that the contract is fair and reasonable and that the client was fully informed of all the facts which enabled him to judge its fairness and reasonableness. No reason is perceived why this rule of law is not as applicable to a contract which is a result of the implied acceptance by the client of an account rendered by the attorney for the value of his legal services, as to any other contract between them, whether written or oral. When the bill was rendered by the plaintiff's assignor, the relation of attorney and client still existed between them as to this particular litigation, and was not terminated until some twenty days thereafter. It also appears that the attorney represented the defendant in other matters pending after the rendition of the bill, the claim for compensation for which was expressly reserved in the letter which accompanied the bill rendered.

Under these circumstances it was incumbent upon the attorney to prove not only the rendition of the bill and the defendant's acquiescence therein, but also to produce evidence from which the jury might judge whether the compensation was fair and reasonable for the services rendered and whether the defendant had such full knowledge of the nature and extent of the services rendered him as to be capable of exercising a fair judgment as to the reasonableness of the bill. This evidence was not introduced by the plaintiff, and the judgment, therefore, should be reversed and a new trial granted, with costs to abide the event, and the finding of fact implied in

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the verdict of the jury, that there was an account stated in the case, should be disapproved and reversed.

Judgment and order reversed and a new trial granted, with cost to abide the event.

MILLS, RICH, PUTNAM and JAYCOX, JJ., concur.

Judgment and order reversed and new trial granted, costs to abide the event.

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LOUIS DEAN SPEIR, as Executor, etc., of CHARLES W. WHEELER, Deceased, etc., Plaintiff, v. ROSALIE WHEELER BENVENUTI and Others, Defendants.

Second Department, June 24, 1921.

**Wills — construction — power of appointment — property situated in New York held under deed of trust for benefit of child of trustee for life with power in trustee to designate remainderman — power exercised by devise of all of trustee's property to child for life and remainder to third persons — Real Property Law, § 176, applied — power not exercised as to property situated in New Jersey.**

Property situate in New York was transferred to the testator in trust for the benefit of his daughter during her life with remainder upon her death to the trustee if then alive; if not, to those whom he might designate in his will or, in default of such designation, to his heirs. The trustee, who was possessed of other property, devised all his property in trust for the benefit of his daughter with remainder over to third persons (194 App. Div. 769).

*Held*, that under section 176 of the Real Property Law, providing that "Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication," it is only where the will permits of no other interpretation that it can be said that the intent that the will is not to operate as an execution of the power appears by necessary implication.

The provision in the will for a trust for the life of the child is necessarily confined in its operation to the testator's own property and the power of appointment operates only on the remainder in the trust property after the child's death.

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The necessary implication of intent not to exercise the power must appear in the will itself and resort cannot be had to extraneous instruments to determine the question, and so the fact that at the time the will was executed there was in existence an agreement purporting to change the original trust agreement so as to nullify the portion of that agreement reserving a power of appointment is not controlling.

In reference to that portion of the trust property situated in New Jersey, it must be presumed that the common law prevails in New Jersey and under the rules thereof a power of appointment is not competently exercised unless the will expresses an intention to exercise it, although it is not necessary that the power be referred to; accordingly the power was not exercised as to the New Jersey property and it did not pass to the remaindermen but under the deed of trust vested in the heir at law.

REARGUMENT of the submission of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*Louis D. Speir*, for the plaintiff.

*Sidney P. Henshaw*, for the defendant Rosalie Wheeler Benvenuti.

*Edwin C. Mulligan*, for the defendant the Salvation Army.

*Joseph T. Ryan*, for the defendant New York Catholic Protectory.

BLACKMAR, P. J.:

The facts are stated in the prior opinion (194 App. Div. 769.) The argument when the case came on before was primarily directed to the question whether the agreement of 1905 was competent to change the terms of the trust and the devolution of the remainder under the deed of 1900. The opinion dealt principally with that question. Whether the will of Charles W. Wheeler executed the power of appointment contained in the deed of 1900, although suggested, was not argued by any of the parties. A motion for a reargument was granted (196 App. Div. 905) to permit that question to be fully argued.

It is claimed by counsel for Rosalie Wheeler Benvenuti that the power of appointment was not exercised by the will of Charles W. Wheeler, deceased, and that, therefore, the

remainder after her life estate vested in her by virtue of the provisions of the trust deed as heir-at-law "according to the statutes of the State of New York then in force *per stirpes*."

Section 176 of the Real Property Law is as follows: "Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication."

As the will of Charles W. Wheeler purported to convey all his real property, it was an execution of the power of appointment unless the intent not to execute the power appears either expressly or by necessary implication. There is no pretense that such intent appears expressly, and the argument of counsel is that it appears by necessary implication. The word "necessary" must be given its full meaning. As was said in *Lockwood v. Mildeberger* (159 N. Y. 186), referring to this very provision of the statute: "Necessary implication results only where the will permits of no other interpretation. Necessary is defined to mean: 'Such as must be;' 'Impossible to be otherwise;' 'Not to be avoided;' 'Inevitable.' The intent not to execute the power, therefore, must not be implied unless it so clearly appears that it is not to be avoided." It is claimed that the intent not to execute the power of appointment appears by necessary implication, because the provision of the will creating a trust for the benefit of Rosalie Wheeler Benvenuti for life duplicates the provision in the deed; and that it is manifestly absurd to create a trust for the life of Rosalie in a remainder after her death. But the will is not confined to the exercise of the power of appointment, but disposes of much other property. Neither is it confined to creating a trust for Rosalie, but disposes of the corpus of the estate after her death. As to the testator's own property the will conforms the devise for the daughter's life to the provisions of the deed. The power of appointment operates only on the remainder after the daughter's death. It is the same as if the will on its face limited the power of appointment to the remainder of the trust created by the deed of 1900, after the death of the daughter. As the will purports to dispose of all testator's property, the law steps in and declares

that such disposition operates as an execution of the power of appointment. As under the deed of trust the power of appointment applies only to the remainder after the death of Rosalie, so the will executed it only as to such remainder. The provision in the will for a trust for the life of the daughter Rosalie is necessarily confined in its operation to testator's own property.

It is further claimed that a consideration of extraneous matters may determine the question whether the power of appointment was exercised. As the testator joined in the agreement of 1905, which purported to change the provisions of the deed of 1900 so as to give the remainder of the trust property to his daughter Rosalie and to nullify that portion of the deed of 1900 which reserved to Charles W. Wheeler the power of appointment, the argument is that he believed that the power of appointment was no longer in existence, and, therefore, did not intend to exercise it. For two reasons this conclusion is not approved. The first is that the necessary implication of intent not to exercise the power must appear in the will itself and resort cannot be had to extraneous instruments to determine the question. The second is that, although at the time of the execution of the agreement of 1905 the testator evidently believed that the power of appointment was done away with, yet it does not necessarily follow that he had that belief at the time the will was executed in 1918. *Non constat*, he may have been advised that the agreement of 1905 was ineffective to change the terms of the deed of 1900; and although at the time of the execution of the agreement of 1905 he marked the deed of 1900 canceled, nevertheless the agreement of 1905 was never recorded. The conclusion which we reach is that it does not appear by necessary implication that the testator did not intend to exercise the power of appointment.

A different result, however, seems to follow in the case of the New Jersey property. This property has to a great extent been sold and the avails have come into the hands of the trustee. But the trust deed of this property provided that a sale should not work a conversion thereof into personal property, but the proceeds of such real estate, when so sold, should continue to be real property for the purposes of the

trust and of the distribution thereof. The question is before us, for the judgment to be pronounced will act by directing the trustee, who is within our jurisdiction, and not directly upon the land itself. We must presume that the common law prevails in the State of New Jersey and decide accordingly. As pointed out in the previous opinion, although a trust to receive the rents and profits of land and apply them to the use of parties might be terminated by agreement of all the parties in interest, yet all the parties in interest did not unite in the agreement of 1905, for the contingent remaindermen were not present, and it may also be noted that the nominal settlor of the trust was not a party to the agreement. Under the common law a power of appointment is not competently exercised unless the will expresses an intention to exercise it, although it is not necessary that the power be referred to in the will. (*White v. Hicks*, 33 N. Y. 383.) I find no intent expressed in the will to exercise the power. According to the rules of common law the power was not exercised, and the New Jersey property, not passing under power of appointment, is vested in the heir-at-law according to the statutes of the State of New York by the provisions of the deed which are operative in case the power of appointment is not exercised. Rosalie Wheeler Benvenuti, as the only heir-at-law of her father, takes the remainder in the New Jersey property by purchase under the provisions of the trust deed of 1900.

Judgment directed to be entered in accordance with the opinion on the former argument as modified by this opinion on reargument.

MILLS, PUTNAM, KELLY and JAYCOX, JJ., concur.

Judgment directed to be entered in accordance with the opinion on the former argument, as modified by the opinion of BLACKMAR, P. J., on reargument. Settle order on notice before the presiding justice.

ROBERT K. HIER and THOMAS J. SCULLY, Respondents, v.  
EDGAR M. WIGHTMAN and W. EARLE PENOYER, Appellants.

Fourth Department, May 4, 1921.

**Sales — title to goods in deliverable state passes when contract made — conduct of owner estopping him from denying authority of one in possession of goods to make sale — replevin — trial — erroneous charge — question of fact for jury as to passing title.**

Under section 100, rule 1, of the Personal Property Law, the title to personal property may pass to the buyer when the contract is made, where there is an unconditional contract to sell specific goods in a deliverable state.

But where a person having sold goods continues in possession of them, the delivery or transfer by that person or other disposition to any one receiving and paying value for the same in good faith, and without notice of the previous sale, may have the same effect as if the person making such delivery or transfer were expressly authorized by the owner of the goods to make the same.

In an action to recover the possession of an automobile it appeared that one member of the plaintiff copartnership was the owner of the automobile in question, that he made an assignment of it to a lumber company in whose employ he was at the time, but was permitted to retain possession thereof and use it as his own and in connection with his work, that thereafter he traded said automobile to the defendants in part payment for a new car, but the said lumber company sold the automobile to the plaintiff copartnership in settlement of a debt before it was delivered to the defendants. *Held*, that it was error for the court to charge that if the automobile was not delivered to the defendants until after it had been sold to the plaintiffs the defendants could not succeed, and that if the delivery to the plaintiffs was first then the defendants had no title.

The evidence was sufficient to carry the case to the jury on the question whether the sale to the lumber company was actually made when the assignment was dated, and if such sale was made before the sale to the defendants, whether the lumber company by its conduct was precluded from denying the authority of its employee, one of the plaintiffs, to make the sale to the defendants.

APPEAL by the defendants, Edgar M. Wightman and another, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Oswego on the 14th day of October, 1920, upon the verdict of a jury, and also from an order entered in said clerk's office on the 7th day of October, 1920, denying defendants' motion for a new trial made upon the minutes.

*Charles J. Yorkey*, for the appellants.

*Don Carlos Buell*, for the respondents.

KRUSE, P. J.:

The controversy is over the ownership of a Ford touring automobile. The action is in replevin. The plaintiffs had the verdict and the defendants appeal. The plaintiff Scully was the manager and in charge of the lumbering operations of the Constantia Lumber Corporation at Constantia, near Syracuse. The lumber company furnished him a Ford runabout plainly marked with the name of the company.

Without the consent or knowledge of the lumber company he traded it in for the Ford touring car in question. The trade was made with the Wightman-Penoyer Company, a corporation dealing in Ford automobiles. The defendants are the officers and own all of the stock of the automobile corporation. Afterwards, as appears by the written assignment dated March 20, 1920, Scully transferred all of his right in the touring car to the lumber company, but he seems to have retained the actual possession of the touring car after the date of the written assignment, using it as he had done theretofore, until, as plaintiff claims, it was taken away from Scully by the president of the lumber company and taken to New York.

On or about June 15, 1920, he made another trade with the automobile corporation, by which he agreed to turn in the Ford touring car in part payment of a sedan. Scully did not have the touring car with him at the time, but stated he would deliver it the next morning. He did not keep his promise, but several days afterward, the exact time is in dispute, the touring car was delivered to the automobile corporation.

Scully was also interested in the lumber business as a partner with Hier, his coplaintiff. The Constantia Lumber Corporation was owing Hier and Scully for a car of lumber, and on or about the twenty-fifth of June the Constantia Lumber Corporation sold the touring car to Hier and Scully in part payment therefor. What has become of Scully and the sedan automobile does not appear. While the automobile corporation retained title to the sedan until paid for, it does not seem to have retaken the same into its possession.

The question submitted to the jury was whether the lumber company had clothed Scully with apparent authority to deal with the car as his own, by leaving it in his possession after making the written assignment in March. But in that connection the jury was further instructed that if the touring car was not delivered to the defendants until after it had been sold to Hier and Scully, the defendants could not succeed; that if the delivery to Hier and Scully was first, then the defendants had no title, to which the defendants excepted. I think the learned judge fell into error in so charging.

Under the rules of the Sales of Goods Act, title may pass to the buyer when the contract is made, where there is an unconditional contract to sell specific goods in a deliverable state. (Pers. Prop. Law, § 100, rule 1, as added by Laws of 1911, chap. 571; *Ferry v. South Shore Growers & Shippers Assn.*, 189 App. Div. 542; *Turner-Looker Co. v. Aprile*, 195 id. 706.)

The plaintiffs claim that there was an actual contract of sale of the touring car of Scully's interest therein to the lumber company on the 20th of March, 1920. If that is so it was concededly prior to the sale made by Scully to the automobile dealers, and if the rule to which I have adverted governs here absolutely, the lumber company has a better title to the automobile than has the defendants' corporation, and the plaintiffs having succeeded to the title of the lumber company, have a right to the touring car superior to that of the defendants' corporation. But there are other provisions of the Sales of Goods Act which may qualify this right.

The buyer ordinarily does not acquire any better title to the goods than the seller had, yet where goods are sold by a person not the owner, though without the actual authority and consent of the owner, the owner may, by his conduct, be precluded from denying authority of the seller. And where a person having sold goods continues in possession of them, the delivery or transfer by that person or other disposition thereof to any one receiving and paying value for the same in good faith, and without notice of previous sale, may have the same effect as if the person making such delivery or transfer were expressly authorized by the owner of the goods to make the same. (Pers. Prop. Law, §§ 104, 106, as added by Laws of 1911, chap. 571; *Barnard v. Campbell*, 55 N. Y. 456, 463.)

The only evidence of the sale of the touring car to the lumber company is the written assignment itself bearing date March 20, 1920, and the genuineness of Scully's signature thereto. While the paper was produced upon the trial, no one testified to the time of its receipt by the lumber company, or the circumstances under which it was delivered to the lumber company, or to any one on its behalf. Upon its face it purports to transfer Scully's interest in the touring car to the lumber company for the sum of one dollar. Mr. Kelly, the president of the company, frankly admits that he does not know how his corporation acquired title to it and no one else has testified to the circumstances under which it was acquired.

The evidence tends to show that Scully remained in the actual possession of the touring car up to the time it was taken from him by Kelly in June, using it, not only in the business of the company, but outside and for his personal use as well; that the automobile dealers had no notice of the sale or any information sufficient to put them upon inquiry that the car did not belong to Scully; that he stated to them when the trade was made that it was his car, and, as one of the defendants says, he had no reason to think anything different; that they had sold it to him and had seen him driving it all the time.

Without detailing the evidence it is sufficient to say that in my opinion the evidence was sufficient to carry the case to the jury upon the question whether the sale by Scully to the lumber company was actually made when the assignment bears date, and if such sale was made before the sale to the automobile company, whether the lumber company, by its conduct, was precluded from denying the authority of Scully to make the sale to the automobile corporation.

The judgment and order should be reversed and a new trial granted, with costs to the appellants to abide the event.

All concur, DAVIS, J., not sitting.

Judgment and order reversed and new trial granted, with costs to appellants to abide event.



CLARA M. CRAMER, Appellant, v. MELANCHTHON W. PERINE  
and MARGARET PERINE, His Wife, Respondents.

Fourth Department, May 4, 1921.

**Deeds — boundary described as running to stream and thence down stream — thread of stream boundary line — accretions — rule for dividing between adjoining owners.**

Where a deed describes the boundary line of the land as running to a creek and thence down the creek, along the bank thereof, the grantee takes title to the center or thread of the stream, in the absence of words of restriction or limitation.

As between adjoining landowners on non-navigable streams each owner takes title to accretions in proportion to his line on the margin in front of his upland according to straight lines drawn at right angles between the side lines of his land on the shore and the center line of the stream.

Accretions, under the common-law rule applicable in this State, belong to the uplands against which they are laid down and ownership thereof passes under the deed to the uplands.

APPEAL by the plaintiff, Clara M. Cramer, from an interlocutory judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Erie on the 11th day of August, 1919, dismissing the complaint on the merits.

*George H. Wade*, for the appellant.

*J. Neil Mahoney*, for the respondents.

LAMBERT, J.:

This action is in ejectment. In 1904 one John L. Dow was the common owner in fee simple of the premises owned respectively by the plaintiff and defendants and the same were bounded northwesterly by Cazenovia creek, as delineated on a map and survey filed in the year 1888 in the county clerk's office of Erie county and identified under cover 330. The lands, the title to which passed to the defendants through mesne conveyances, were conveyed by Dow, January 22, 1904. This description carried title to the thread of Cazenovia creek. In February, 1904, Dow conveyed the lands to which the plaintiff succeeded to the title, and in its southerly descrip-

tion ran to the waters of Cazenovia creek and thence northwesterly down the creek, and along the bank thereof, to the lands of the respondents.

At the time of the conveyances by Dow, the proof is silent as to the extent of accretions made between the creek and the northwesterly boundary of the premises of the parties. It does appear that the lands in dispute were made by slow process of accretion. At the time of bringing this action it is conceded that a strip of land had been made northwesterly of the premises of the parties, at least 300 feet in width and extending northwesterly of the lands described in their respective titles. The radius of the new bank of the creek far exceeds the existing one at the time of the Dow conveyances in 1904. This is the land in dispute.

The plaintiff, by the judgment rendered in this case, has been given all the lands in dispute northerly and northwesterly of a continuation of the southeasterly boundary of the defendants' premises. The defendants seek to sustain this judgment upon the theory that the plaintiff's premises have been cut off from common ownership later than the defendants' title and by a description which, it is contended, limits the title of the plaintiff's premises to the bank of Cazenovia creek. This position is untenable. The southerly boundary of the plaintiff's premises carries the title to the waters of the creek and thence down the creek, along the bank thereof, etc. Under all the authorities to which our attention has been drawn, this description carried the plaintiff's title to the center of the creek in the absence of words of restriction or limitation. (*Seneca Nation of Indians v. Knight*, 23 N. Y. 498; *Gouverneur v. N. I. Co.*, 134 id. 355; *Matter of City of New York [West Farms Road]*, 212 id. 325.)

It is the claim of the appellant that inasmuch as her title extends to the thread of the creek, she is entitled to have her northwesterly corner established on the made or new bank of the creek, at a point which will give the present owners the same relative percentage of distance on the new bank as was conveyed to them and their respective grantors by the common grants in 1904. We are of the opinion that the contention of the appellant should be upheld. (*O'Donnell v. Kelsey*, 10 N. Y. 412.) It is conceded by both parties that

their respective descriptions of property do not extend to the new bank of the creek and that title to the accreted lands is obtained through the doctrine of the common law. There is no statute to which our attention has been drawn governing the question.

The latest expression upon this subject by the Court of Appeals is contained in *Calkins v. Hart* (219 N. Y. 145). A general rule is by that case declared applicable to non-navigable streams and inland lakes, as follows: "In this State and in most of other jurisdictions where the common-law rule obtains, the rule has been established that as between adjoining owners on non-navigable streams and rivers, each owner takes title *ad medium filium aquæ*, in proportion to his line on the margin in front of his upland according to straight lines drawn at right angles between the side lines of his land on the shore and the center line of the stream."

The rule here announced in the Court of Appeals has been applied many times in this State. (*People ex rel. Cornwall v. Woodruff*, 30 App. Div. 43; *affd.*, 157 N. Y. 709; *Mulry v. Norton*, 100 id. 434, and many more cases that might be cited.)

The accretions under the common-law rule applicable in this State belong to the uplands against which they are laid down and ownership thereof passes, under the deed, to the uplands. (*Mulry v. Norton*, 100 N. Y. 434.)

Neither the evidence nor the findings in this case point out a location upon the new bank of the creek which would permit a definite finding as to the proportion of the accreted lands which should be awarded to the parties respectively. For this reason it is necessary to reverse the judgment and send the case back to the trial court for findings upon which a judgment can be rendered, giving to these parties such a portion of the accreted lands as they are entitled to under the rule above indicated, with costs to the appellant to abide the event.

All concur.

Judgment reversed and new trial granted, with costs to appellant to abide event. The finding of fact contained in the decision and numbered III is disapproved and reversed.

COCHRAN BOX AND MANUFACTURING COMPANY, INC., Respondent, v. THE MONROE BINDER BOARD COMPANY, Appellant.

Fourth Department, May 20, 1921.

**Corporations — when foreign corporation is doing business in this State so that service of summons and complaint may be made on managing agent — test of determining existence of foreign corporation in State.**

A foreign corporation is doing business within this State, and summons and complaint may be served on its managing agent herein under section 432 of the Code of Civil Procedure, where it appears that the agent had desk room in a building in New York city and employed a stenographer to assist him, that the telephone was in the name of the defendant and that letterheads used by the agent contained the name of the defendant with its home address, and also a statement of the location of its New York office and that the said agent was its representative; that while the agent had no power to extend credit or to collect or disburse money or to employ or discharge other agents, still he was engaged in doing a large amount of business and negotiating important contracts on behalf of the defendant and for that purpose maintained an office within the State. There is no precise test of the nature or extent of the business that must be done within this State so that service on a managing agent will be good service on a foreign corporation and all that is requisite is that enough be done to enable the court to say that the corporation is here. HUBBS, J., dissents.

APPEAL by the defendant, The Monroe Binder Board Company, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Niagara on the 24th day of February, 1921, denying defendant's motion to set aside the summons and complaint.

*Dudley & Gray* [Alfred W. Gray of counsel], for the appellant.

*Dempsey & Fogle* [S. Wallace Dempsey of counsel], for the respondent.

DAVIS, J.:

The question presented is as to the validity of service of process on a foreign corporation.

There is little dispute as to the facts. The defendant is a foreign corporation having its office and principal place of business in the city of Monroe, Mich. The plaintiff is a

domestic corporation with its principal office in the city of Lockport.

The defendant had an agent, one Hutchinson, who had a desk in a large room on the fifth floor of the Grand Central Palace, New York city. There it employed a stenographer who looked after the correspondence of Hutchinson, and it was there he received his mail, but no customers came to the office to transact business. Over the desk was a sign reading, "Monroe Binder Board Co., Monroe, Mich., Container Department. Manufacturers of Corrugated and Solid Fibre Shipping Cases. H. L. Hutchinson, New York Representative." The telephone in the office was apparently in the name of the defendant and the letterhead used by Hutchinson contained the name of the defendant, with its home address and below, in red letters, the words, "New York Office, 480 Lexington Avenue, Grand Central Palace. H. L. Hutchinson, New York Representative, Vanderbilt, 7300," and below that the words, "Address your reply to New York office."

Hutchinson's employment was to solicit business for defendant and send any orders to the home office for approval. He had no power to extend credit, to collect or disburse money or to employ or discharge agents and had no charge or control of other soliciting agents. The defendant had no bank account in this State and owned no property here except, perhaps, the desk in its New York office. The contract which is the subject of the suit was dated at Lockport, N. Y., and the shipments were apparently to be made to the plaintiff at its place of business in that city.

After what may be regarded as diligent efforts to make service on an officer of the defendant corporation, the summons and complaint were served on Hutchinson as managing agent of the defendant in the State of New York.

In order that jurisdiction may be obtained where a foreign corporation is a party, it is necessary that it either have property in the State or that it be doing business in the State; and that the process be served on an officer of the corporation, or if such service cannot be made, then service may be made on a person designated for the purpose, as provided in section 16 of the General Corporation Law, and if there is no such person designated, on a cashier, director or managing agent

of the corporation within the State. (Code Civ. Proc. § 432; *International Harvester Co. v. Kentucky*, 234 U. S. 579; *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259.) As to what constitutes doing business within the State, each case must depend upon its own facts to show that this essential requirement of jurisdiction exists. (*International Harvester Co. v. Kentucky*, *supra*.) There is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is here. (*Tauza v. Susquehanna Coal Co.*, *supra*.)

The practice is not yet sufficiently well settled to determine in exactly what cases a corporation is doing business in the State and as to just what powers and duties a representative must have to be deemed a "managing agent." In the *Tauza* case the defendant had eleven desks and some other office equipment and the "sales agent," upon whom process was served, had eight salesmen under him, who were subject to his orders. In the instant case the defendant has but one desk and its representative seems to be doing considerable business and negotiating important contracts without the assistance of subordinates. The amount of property of this kind and the number of men engaged in its service are not, we think, the ultimate test, so long as an office is maintained, important contracts made, and business connected therewith carried on within the State.

Among the many adjudicated cases in this State, somewhat in conflict, where this question has been passed upon, the one most similar in its facts to the one under consideration is that of *Interocean Forwarding Co. v. McCormick & Co.* (168 N. Y. Supp. 177; *affd.*, 183 App. Div. 883). For the sake of uniformity in cases arising under a similar state of facts, we will follow the rule laid down by the First Department in the case just referred to and will hold that the defendant was, under the circumstances above related, doing business in the State of New York and that service was properly made on Hutchinson as managing agent.

The order must, therefore, be affirmed.

All concur, except HUBBS, J., who dissents.

Order affirmed, with ten dollars costs and disbursements.

JACENTAS MALUKAS, Respondent, v. OVERSEAS SHIPPING  
COMPANY, INC., Appellant.

Second Department, June 3, 1921.

**Ships and shipping—negligence—action by longshoreman for injury received while using defective truck in loading boat—longshoreman not bound to use defective appliances—existence of maritime lien does not affect longshoreman's common-law rights.**

In an action by a longshoreman to recover for personal injuries received while loading a boat, the issues of negligence, contributory negligence and assumption of risk were for the jury, where it appeared that the truck was defective and that defendant's representative, who had been notified of the defect, told the plaintiff that it was all right and to go on with the work.

A longshoreman does not stand in the same class as a seaman; the former can quit the job, but by ship's discipline seamen must obey and keep on using the ship's appliances.

The fact that plaintiff has the security of a maritime lien does not change his rights and duties in this action at common law.

APPEAL by the defendant, Overseas Shipping Company, Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 3d day of November, 1920, on the verdict of a jury for \$2,000, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

*E. C. Sherwood* [*Benjamin C. Loder* with him on the brief], for the appellant.

*Warren Bigelow* [*Silas B. Axtell* with him on the brief], for the respondent.

PUTNAM, J.:

Plaintiff, a longshoreman, not a seaman, was loading steel billets upon an outward-bound steamer at Hoboken in March, 1918, during the war. Defendant as employer is sued for personal injuries from defects in a truck in having a bent axle. It was to carry heavy steel billets from the hatch to the stowage in the lower between decks. After testimony that this defect had been complained of to defendant's representa-

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tive, who told the men that it was all right and to go on, and that later the truck tipped over, letting the billets strike plaintiff, the issues of negligence, contributory negligence and assumption of risk were for the jury; and no error is found in the court's charge. A longshoreman does not stand in the same class as a seaman; the former can quit the job, but by ship's discipline seamen must obey and keep on using the ship's appliances. (*Eldridge v. A. S. Co.*, 134 N. Y. 187; *Cricket S. S. Co. v. Parry*, 263 Fed. Rep. 523.) The circumstance that stevedores now have the security of a maritime lien (*Atlantic Transport Co. v. Imbroke*, 234 U. S. 52) does not change their rights and duties when suing an employer at common law.

The judgment and order are, therefore, affirmed, with costs.

Present — BLACKMAR, P. J., MILLS, RICH, PUTNAM and JAYCOX, JJ.

Judgment and order unanimously affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. THOMAS F. DOYLE and Others, Respondents, v. GEORGE C. ATWELL, Acting Chief of Police of the City of Mount Vernon, Respondent.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant.

Second Department, June 3, 1921.

**Municipal corporations — ordinance against holding meetings in public streets without permit is valid — unjustifiable discrimination not shown — withholding permit not denial of free speech — arrest of relators proper — mandamus proper remedy where permit improperly withheld.**

An ordinance of the city of Mount Vernon, enacted pursuant to the power invested in the common council by section 166 of the city charter, prohibiting the holding of public meetings upon the public streets of the city without special permit from the mayor, and providing that a violation of the ordinance constitutes a misdemeanor, is valid.

The power to grant or withhold such permits carries with it the duty to consider public convenience and to pay regard to the liability of undue



congestion, disturbance or disorder which may interfere with the public rights to pass and repass, and the circumstance that on the same night that the relators were arrested for violating said ordinance others were permitted to hold a meeting in the streets did not show unjustifiable discrimination.

Withholding permits for speaking in streets or parks under the ordinance did not deny the right of free speech to the defendants.

If the relators felt themselves aggrieved and believed that the action of the mayor was unjustified, they should have proceeded by mandamus to compel him to issue a permit.

APPEAL by the People of the State of New York from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 14th day of October, 1920, sustaining writs of habeas corpus and discharging relators from custody.

The several relators had been arrested by the Mount Vernon police in addressing a popular assemblage at the corner of Fourth avenue and Second street in Mount Vernon, on Saturday evening, October 2, 1920, without any permit from the mayor. The three writs were heard together, resulting in one consolidated order and a single appeal.

The charter of Mount Vernon (Laws of 1892, chap. 182, § 166, subd. 5, as amd. by Laws of 1896, chap. 692) empowers the common council "To prohibit the gathering or assembling of persons upon the public streets of said city or congregating upon the corners of the streets thereof, and to authorize the police officers of said city to disperse all such gatherings or assemblages of persons, and upon the refusal of persons so congregated or assembled to disperse when commanded so to do by a duly appointed police officer, under regulations to be prescribed by the board of police commissioners such police officer may make summary arrests of any person or persons so refusing, and take him or them forthwith before the city judge of said city, to be by him tried as disorderly persons and punished as such, and all such persons are hereby declared to be disorderly persons."

Accordingly the common council on September 29, 1917, passed this ordinance, adding section 21 to chapter 31 of the ordinances:

" § 21. The gathering or assembling of persons upon the public streets of the city, the holding of public meetings upon

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the public streets of the city, the congregation of persons in groups or crowds upon the public streets of the city, without special permit of the Mayor, to be granted in writing, under his hand and seal, is hereby prohibited. Any violation of the provisions of this section is declared to be a misdemeanor, punishable upon conviction by a fine of Twenty-five (\$25) Dollars, or by imprisonment in the County Jail of Westchester County for twenty-five (25) days."

The affidavit of one of the relators, Mr. Thomas F. Doyle, shows that the Socialist party had arranged for outdoor meetings in Mount Vernon; that such a meeting had been held at this place two weeks before; that on September 22, 1920, when relator applied to the mayor for a meeting permit at this locality, the mayor had stated "that he would grant no further permits for Socialist meetings while he was mayor and that any public speaker talking under said auspices in the city of Mount Vernon would be arrested."

Nevertheless the people gathered at this place, and as the speakers admitted that they had no permit, and, against the officer's warning, insisted on speaking, their arrest followed. At the hearing under the writs of habeas corpus it was maintained that this ordinance was unconstitutional, also that permits were granted and withheld in a discriminatory manner. Accordingly the learned justice sustained the writs and discharged the relators.

*Emory R. Buckner [Lee Parsons Davis, District Attorney, Frederick W. Clark, Corporation Counsel, Elihu Root, Jr., and Robert P. Patterson with him on the brief], for the appellant.*

*Arthur Garfield Hays, for the respondents.*

PUTNAM, J.:

The Legislature had empowered the common council of Mount Vernon to enact ordinances regulating the use of public streets for holding meetings; and the ordinance clearly came within the terms of the charter. Hence public speaking upon the streets was only allowable after such leave. Without any permit from the mayor, and against his refusal thereof, a meeting could not be lawfully held. The circumstance that at the opposite street corner the Salvation Army held a meeting

that same night did not show an unjustifiable discrimination. The power to grant or withhold such permits carries with it the duty to consider public convenience and to pay regard to the liability of undue congestion, disturbance or disorder so as to interfere with the public rights to pass and repass.

Withholding permits for speaking in streets or parks, therefore, does not deny the right of free speech. (*City of Buffalo v. Till*, 192 App. Div. 99; *People v. Pierce*, 85 id. 125; *Davis v. Massachusetts*, 167 U. S. 43; 12 C. J. 954, § 479.) It follows that these relators, in mistaken assertion of their supposed rights, were actually breaking a valid ordinance; so that in its enforcement an arrest was in the lawful exercise of the police power. Even if discrimination against a political party were suspected, those who felt discriminated against could not take the law into their own hands, and, by such assemblage, defy this city ordinance. If a permit be improperly withheld, its issuance may be compelled through mandamus.

Hence the order should be reversed, and the writs of habeas corpus dismissed, with ten dollars costs and disbursements.

BLACKMAR, P. J., RICH and JAYCOX, JJ., concur; MILLS, J., not voting.

Order reversed and writs of habeas corpus dismissed, with ten dollars costs and disbursements.

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SARAH G. THOMPSON, Appellant, v. JOHN M. THOMPSON, Respondent.

Second Department, June 3, 1921.

**Husband and wife — divorce — alimony — contempt proceedings to enforce payment — whether disobedience of order was willful and in contempt of court is addressed to discretion of court — whether defendant shall be fined or imprisoned is matter of discretion — motion properly denied where plaintiff had accepted reduced alimony — inability to pay alimony is not defense to contempt proceedings.**

In contempt proceedings to enforce the payment of alimony, the question whether the defendant disobeyed the order willfully or intentionally and whether he acted in defiance or contempt of court is largely addressed to

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the discretion of the justice presiding, and while he cannot disregard the absolute provisions of the law, still when it comes to the final question whether the party shall be fined or imprisoned, such matter rests in the discretion of the justice.

A justice at Special Term is justified in denying a motion to punish a defendant for contempt for failing to pay alimony in full, where it appears that the plaintiff for several years accepted less than the full monthly payment.

The defendant's inability to pay the alimony fixed by the final judgment, unaccompanied by other excuse, is no defense to an application to enforce the decree by contempt proceedings.

APPEAL by the plaintiff, Sarah G. Thompson, from an order of the Supreme Court, made at the Kings Special Term and entered in the office of the clerk of the county of Suffolk on the 3d day of March, 1921, denying plaintiff's motion to punish the defendant for contempt for failure to pay alimony.

*William P. McCool* [*Raymond B. Stringham* with him on the brief], for the appellant.

*Ralph H. Blum*, for the respondent.

KELLY, J.:

Where application is made to punish a party for contempt of court, and he appears, and by affidavit or otherwise offers an explanation or excuse for his alleged failure to obey the mandate of the court, I take it that it is for the court to determine, *first*, whether he has in fact disobeyed the judgment or order, and, *second*, if disobedience is proved whether it was willful or intentional and whether he acted in defiance or in contempt of the court. In the last particular, the question is largely addressed to the discretion of the justice presiding. While he should not and cannot disregard the absolute provisions of the law because of his merciful or kindly disposition, when it comes to the final question whether the party shall be fined or imprisoned, that rests with the justice at Special Term. (*Matter of Oldmixon*, 116 App. Div. 925.)

The learned justice at Special Term denied the motion in the present case because the plaintiff for several years had accepted alimony at the rate of \$50 per month instead of \$100 per month as provided in the final decree, and held upon

the facts presented to him that she had waived and relinquished her right to ask that defendant be punished for contempt for failure to pay the sum originally required to be paid. I think the facts so presented justified the order made.

But the defendant is now advised that the plaintiff insists upon payments as directed by the judgment. If he is entitled to any modification of the judgment, as to which no opinion is expressed, he must make application to the court. Upon the facts here presented the defendant's inability to pay the alimony fixed by the final judgment, unaccompanied by other excuse, is no answer to an application to enforce the decree by contempt proceedings. (*Ryer v. Ryer*, 33 Hun, 116.) Nor does the denial of the motion affect any other right or remedy of the plaintiff.

The order is affirmed, but without costs.

BLACKMAR, P. J., MILLS, PUTNAM and JAYCOX, JJ., concur.

Order affirmed, without costs.

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SARAH ANTOWILL, Respondent, v. JOSEPH FRIEDMANN,  
Appellant.

Second Department, June 10, 1921.

**Physicians and surgeons — action to recover for injuries received from X-ray — defendant's proven and undisputed qualifications as physician improperly submitted to jury — sores caused by use of X-ray might have resulted from hypersensitiveness of patient or negligence — improper for court to charge that existence of sores was evidence of negligence.**

In an action against a physician to recover damages for injuries alleged to have been caused by negligent application of the X-ray treatment in which defendant's qualifications as a physician were proven and undisputed it was improper to submit defendant's want of due qualifications to the jury as a possible specification of negligence.

It was error also for the court to charge the jury that the fact that sores resulted from the application of the X-ray treatment by the defendant was evidence of negligence, since it appeared that a few people are super-sensitive to X-ray treatment, that the treatment will burn such people although properly applied, and that there is no way of knowing the

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disposition of the patient in advance of the test of actual treatment and its results, and since it appeared, also, that the sores might have been caused by improper application of the treatment or by applying a second treatment to a hypersensitive patient where, after the first application, there appeared a redness or soreness in the parts to which the application had been made.

APPEAL by the defendant, Joseph Friedmann, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 26th day of November, 1920, upon the verdict of a jury for \$24,486, and also from an order entered in said clerk's office on the 9th day of December, 1920, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*James J. Mahoney* [*George J. Stacy* with him on the brief], for the appellant.

*Abraham Benedict* [*Thomas J. O'Neill* and *David Gorfinkel* with him on the brief], for the respondent.

MILLS, J.:

This action is one to recover damages for personal injuries which the plaintiff, the patient of defendant physician, claims to have received through his negligence in administering to her person X-ray treatment. There is really no dispute about the material facts, except in one respect, as hereinafter specified. Therefore, except as to that matter of controversy, I make the following brief summary of the material facts.

The defendant at the time was, and for several years before had been, a duly educated and licensed physician, specializing in the use of the rather modern method of treatment known as X-ray. He had evidently come to be recognized in the profession as an authority on that treatment. The plaintiff, a widow of forty-four years of age, was suffering from a severe external itching about her private parts, both front and back, without any visible affection to the skin, known as *pruritus vulvae et ani*. For that trouble X-ray application is a recognized and accepted treatment. She consulted her physician, Dr. Michalovsky, and was advised by him to go

to the defendant for treatment; and thereafter, on May 17, 1919, she called upon defendant at his office. He examined her and proceeded to apply the X-ray treatment to both affected parts. No question was made by the evidence or is made here, but that, if he applied the treatment as he in his testimony described it, he applied it properly and without any negligence. She returned to him on May twenty-fourth, and he repeated the treatment in substantially the same way. No question as to the manner of that treatment is made if, as hereinafter explained, any should have then been given, which is the real dispute of fact in the case. She returned to him on May thirty-first. He then gave her no treatment, but merely a lotion to be applied to the parts. She did not return to him again. She had then begun to suffer much pain in those parts, as though from burns, and ulcerating sores resulted of an extreme character. She was thereafter treated for a long time at a hospital. There are a few people, probably not more than one out of every 200 to 300, who are supersensitive to X-ray treatment, and apparently that disposition of the patient cannot be known in advance of the test of actual treatment and its results. Such cases are so rare that evidently physician and patient have to take that risk — the one in administering, and the other in receiving, the treatment. It does not appear that plaintiff was ever before subjected to it, and the fair inference is that she had not been. All the experts agreed that if, on May twenty-fourth, the date of the second treatment one week after the first, redness of the external parts had appeared and hair had fallen out, that condition was a sure indication that too much treatment had been given the patient, whether she was normal or abnormal, and that, therefore, the second treatment should not then have been given her. Indeed, defendant testified practically to the same effect, and declared that had there been such redness on May twenty-fourth he would not have given her a second treatment then, or until after three weeks. The plaintiff testified that both the redness and the loss of hair appeared within four days after the first treatment, and were present on May twenty-fourth when the second was given; whereas defendant testified positively that on May twenty-fourth there was no such condition. The plain-

tiff's testimony upon this point was not very explicit, viz., "a little red;" while defendant's was explicit to the contrary. This dispute between the parties themselves presented the only issue of fact in the case. It was, in my judgment, sufficient to warrant sending the case to the jury, and even to sustain the verdict here as not against the weight of the evidence, and as well to sustain the contrary verdict, had it been rendered.

In that state of the proof we would naturally expect to find that the charge, at least in the end, submitted the case to the jury as to negligence, that is, the issue of liability, upon the specific question whether or not, at the time of the second application of the treatment, those symptoms, redness and loss of hair, had appeared; but the charge contains no such specification, and, indeed, no express notice of that dispute or issue at all. On the contrary it dealt entirely with generalities in submitting the issue of defendant's negligence — quite contrary, I think, to the usual custom of the experienced trial justice.

In the commencement of the charge he stated the general rule of a physician's duty correctly as we find it given in the accepted authorities, namely, that a physician is bound to have the knowledge and skill ordinarily possessed by members of his profession, and in the particular case to exercise ordinary care in the use of that knowledge and skill in the treatment. I have never been able to appreciate the practical use in giving to the jury the former, viz., the want of general qualification, as a possible specification of negligence, because it stands to reason that whatever the physician's such want may be, if he was not negligent in treating the particular case, he would not be liable. Herein, as above stated, defendant's qualifications were proven and undisputed. The main charge thus submitted defendant's want of due qualification to the jury as a possible specification of negligence. In response to defendant's first request, the learned trial justice reiterated that submission, defendant excepting. Later, plaintiff's trial counsel, evidently fearful of taking the responsibility of that submission, sought to get the justice to formally withdraw it, so as to devitalize defendant's exception; but upon being put by the justice to an express concession declined to make



it, and thereupon in the end the justice left that matter to the jury as a question of fact for them to decide. It looks very much as though counsel desired to have the benefit of a real submission to the jury of the question, and at the same time to avoid responsibility for it. However that may be, I am convinced that that submission was error strongly prejudicial to the defendant. There was no doubt in the case but that he was duly qualified, and no question of his possible want of such qualifications should have been submitted to the jury.

The main charge further instructed the jury that the result in the sores might be considered by them as some evidence of negligence. Indeed, it was to the effect that the sores constituted sufficient proof to cast upon the defendant the duty or burden of explanation; and in passing upon defendant's request the justice practically reiterated that submission. This again did not satisfy the plaintiff's astute and experienced trial counsel, and he asked an explicit instruction that still the burden of proof throughout rested upon the plaintiff, which was given; but in that very request he asked the reiteration of the instruction that the result of the treatment in this case, that is, the sores, might be regarded "as some evidence of negligence," so that that part of the main charge stood in the end reiterated and emphasized. In my judgment that instruction was erroneous. It having been proven that that specific result might come from proper treatment without negligence on the part of the physician, that is in a case of a hypersensitive person, the mere fact that that result did follow the treatment in this case was in itself no evidence of negligence. The case thus presented was merely one where, according to the proof, the stated result might have followed from the one cause, viz., defendant's negligence, or from another cause, viz., plaintiff's hypersensitiveness; and, therefore, the naked fact of that result was in itself no evidence of the existence of the one cause in preference to that of the other. It would be a work of supererogation to cite authorities upon this point, as the doctrine may now be regarded as elementary, being supported by reason as well as by abundant decisions. I conclude, therefore, that the defendant did not receive a fair trial, and should be granted a new one.

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I advise, therefore, that the judgment and order appealed from be reversed and a new trial granted, with costs to abide the event.

BLACKMAR, P. J., RICH, PUTNAM and JAYCOX, JJ., concur.

Judgment and order reversed and new trial granted, with costs to abide the event.

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LOUIS BROWN, Respondent, v. PHILIP SALZBERG, Appellant.

Second Department, June 10, 1921.

**Contracts — action to recover damages for breach of contract to sell dental business — verdict that there was complete contract against weight of evidence — evidence — self-serving declarations — original memorandum of contract improperly rejected — damages — charge erroneous which submits two measures of damages.**

In an action to recover damages for breach of an alleged contract whereby the defendant was to convey a dental business to the plaintiff, *held*, that the verdict of the jury that there was a complete contract executed by the parties was against the weight of the evidence.

It was error to admit testimony by a former employer of the plaintiff to the effect that the plaintiff said that he had made some arrangement with the defendant since such statement was a self-serving declaration to a vital issue in the case, that is, that an arrangement had been made and not that it was being made.

It was improper to exclude the original memorandum of the contract drawn by the attorney for the parties in their presence on a general objection, though technically it was not admissible without preliminary proof that, aside from it, the witness could not recollect fully.

It was error for the judge to submit to the jury two measures of damages, namely, that the plaintiff was entitled to recover his year's salary under the alleged contract and also prospective profits, and also that the jury might take into consideration the difference between the contract price and the price for which the defendant subsequently sold the business.

APPEAL by the defendant, Philip Salzberg, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 22d day of December, 1920, upon the verdict of a jury, and also from an

order entered in said clerk's office on the 3d day of January, 1921, denying defendant's motion for a new trial made upon the minutes.

*Benjamin Reass* [*Aaron Benjamin* with him on the brief],  
for the appellant.

*Robert H. Ernest* [*Samuel L. Chess* with him on the brief],  
for the respondent.

MILLS, J.:

This action was brought to recover damages for the breach by defendant of an alleged contract between the parties, by which the plaintiff was to purchase, and the defendant to sell to him a certain dental business and office in the borough of Brooklyn. The complaint alleged that the contract was made on September 25, 1919, and that on October 10, 1919, defendant repudiated it and refused to perform it, to plaintiff's damage, including loss of prospective profits, to the aggregate amount of \$8,620.

Plaintiff's claim was sustained directly only by his own testimony, which was as follows: He, being in the employment of a certain dental firm, wished to go into business for himself, and, learning that the defendant desired to sell out his dental business and office, entered into negotiations with him for the purpose of purchasing the same. Those negotiations went on for several weeks, and finally, on about September 25, 1919, culminated in an absolute oral agreement upon these terms—total price \$3,000; the parties to work together one year, defendant to work nights only; plaintiff to draw \$60 a week as salary, and defendant \$30; plaintiff to deposit at once with defendant \$500, with which he was, at the end of the year, to be credited upon the purchase price, if he elected to buy; and all profits made during the year to be divided equally. Upon cross-examination plaintiff gave the terms as though the purchase was to be absolutely accomplished at the end of the year, and not merely that he had an option. He admitted that there was between them talk of a written contract or agreement being made—that he himself asked for one; but he denied that one was ever

prepared or presented to him. As to the payment of the \$500, he did not claim that he ever made it or offered to make it, but merely that he was ready to make it.

Defendant's testimony, on the other hand, was as follows: The parties did, about September 25, 1919, orally come to an agreement upon terms which defendant stated somewhat differently than plaintiff gave them; but the two agreed then to have a lawyer draw up a written agreement accordingly, and for that purpose saw the witness, lawyer Scholes, at his residence, and gave him directions which he then and there in their presence reduced to writing. Shortly thereafter the defendant received the written contract in duplicate, drawn up by Scholes in strict accord with those directions. He then presented them to plaintiff for signature, but plaintiff refused to sign and never did sign them, upon the ground that he was not willing to pay over at once the \$500 to the defendant, but wanted merely to deposit it with someone else. To that defendant would not agree, and so the matter fell through. The written contract thus prepared was offered and received in evidence. Subsequently defendant sold out his business to another party for \$5,000. The lawyer Scholes (sometimes called Schultz in the record) testified fully corroborating the defendant as to his part in the matter; and Miss Cook, the stenographer, also a lawyer, who drew up the contracts from his original memorandum, testified to that effect. Plaintiff, in rebuttal, denied that he ever saw Scholes, or that there was to his knowledge any written contract prepared. The charge is very long, but technically correct. It fails, however, anywhere to call attention to the testimony of Scholes or Miss Cook, which to my mind is the most important testimony in the case.

Appellant's main contention here is that the verdict that there was a complete contract was against the weight of the evidence. I think that this contention is well made. It seems to me that the preponderance of the proof is that the parties intended to have their agreement reduced to writing and signed, before it should be complete. That would be the natural thing for them to do in a matter of that importance; and the testimony of Scholes and Miss Cook appears to be strong and convincing in that direction.

Moreover, I think that substantial errors to defendant's prejudice were committed upon the trial as follows, namely:

(a) The plaintiff called one of his former employers, Dr. Berall, and proved by him that, the latter part of September, 1919, when plaintiff claimed the oral agreement with defendant was fully made, he notified those employers that he was going to leave them. That witness, over defendant's objection and exception, was also permitted to testify that plaintiff in that connection told him that he, plaintiff, "had made some arrangement with Dr. Salzberg," the defendant. I think that that ruling constituted error, and that the evidence received under it was to the substantial prejudice of the defendant. It was receiving proof of plaintiff's declaration out of court to the vital fact or issue in the case, *i. e.*, that an arrangement had then been made, not that it was being made.

(b) The trial court, upon plaintiff's objection, excluded the original memorandum which Scholes made from the statements of both parties to him as a basis for drawing up the contract. Probably that was not technically admissible without preliminary proof that, aside from it, witness could not recollect fully; but the objection was general. If it had been specific upon that ground, very likely it could have been obviated. Indeed, the cross-examination indicates some uncertainty in witness' recollection.

(c) The trial justice having charged that, if plaintiff was entitled to recover, he was entitled to recover not only his year's salary loss, but also prospective profits (this, I suppose, was upon the doctrine of *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205), upon plaintiff's request further charged that the jury had a right "to take into consideration the difference between \$3,000, the alleged contract price between the plaintiff and the defendant, and \$5,000, the contract price" (meaning what defendant sold for). I think that this latter construction was erroneous. Possibly, under the circumstances, plaintiff might be permitted to elect whether to take the measure of damages declared in the main charge, *viz.*, loss of salary and prospective profits, or to take the more general measure, *viz.*, the value of the contract — here the difference between the \$3,000 which plaintiff was to pay, and the \$5,000 for which defendant sold to a third party.

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Surely plaintiff was not entitled to the benefit of both measures, and the effect of the entire charge was to give him that.

The charge, moreover, seems unsatisfactory because it dealt evasively with certain proper requests in behalf of the defendant, notably with that as to the effect of plaintiff's failing to produce his books.

Upon the whole, therefore, I conclude that defendant has not had a fair trial, and should be permitted to have another.

I advise, therefore, that the judgment and order appealed from be reversed and a new trial granted, with costs to abide the event.

BLACKMAR, P. J., RICH, PUTNAM and JAYCOX, JJ., concur.

Judgment and order reversed and new trial granted, with costs to abide the event.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
MICHAEL RUSSELL, Appellant, Impleaded with MICHAEL  
CAHILL, Defendant.

Second Department, June 10, 1921.

**Crimes — grand larceny, first degree — evidence not sustaining conviction of police officer of larceny committed while on duty — evidence — testimony by another officer as to statement made by complaining witness is hearsay — evidence that complainant identified defendant improper.**

On a prosecution for grand larceny in the first degree charged against a police officer who, it was alleged, while on duty, stole a watch and money from the complainant, evidence examined, and held, that the defendant's guilt was not established beyond a reasonable doubt.

Testimony of a police officer offered by the prosecution in which he stated what the complainant said to him while not in the presence of the defendant was hearsay, clearly improper and incompetent, and should have been rejected.

A statement by the court that the testimony was admitted subject to its being connected with the defendant, and that if it was not connected it would be stricken out did not cure the error, where in fact it was not stricken out.

It was reversible error to permit the People to show that, the complainant identified the defendant as the man who stole his watch and

money, where the weight of the evidence was to the effect that the defendant was not the person who robbed complainant, if he was robbed. (Per RICH, J.)

PUTNAM and JAYCOX, JJ., dissent, with opinion.

REARGUMENT of an appeal by the defendant, Michael Russell, from a judgment of the Supreme Court, rendered on the 8th day of March, 1920, convicting him of the crime of grand larceny in the first degree. (See 196 App. Div. 950.)

*Robert H. Elder [Otho S. Bowling and Charles E. Russell with him on the brief], for the appellant.*

*Ralph E. Hemstreet, Assistant District Attorney [Harry E. Lewis, District Attorney, and Harry G. Anderson, Assistant District Attorney, with him on the brief], for the respondent.*

RICH, J.:

On the night of November 29, 1919, one Nels Anderson, a Finnish sailor, claimed to have been robbed of three dollars in money and a gold-filled watch.

The complainant arrived in New York city on the afternoon of November 29, 1919. After engaging a room in Henry street in the borough of Brooklyn, he purchased a bottle of whisky and proceeded to a dance hall in a remote outlying district in the borough, where he remained until sometime after midnight. He drank the entire contents of his whisky bottle, and between three and three-thirty o'clock in the morning, though it was raining, he was wandering aimlessly about the streets in the vicinity of the dance hall. Anderson seems to be somewhat hazy as to his movements between the time he left the dance hall, a little after midnight, and three-thirty o'clock in the morning. He testified, however, that the appellant, who was a police officer, accosted him and asked if he had committed murder. He says the officer said: "One man got killed last night. \* \* \* Show your hand, if you got any blood on your hand;" that the officer then went to a telephone on a pole in the street and said: "'I have got here a fellow with black hair and an overcoat on, and I think he is the fellow.' Then he said something about a hallway, but I can't remember what it was, because I was afraid, because I thought what kind of trouble I got in, so I didn't take notice of everything

that he was telling." He says the defendant placed him in a hallway and said he would return; that he did return half an hour later and took from his person three dollars in money, together with a gold-plated Elgin watch, substituting a nickel one.

Afterward the complainant found his way to the Fort Hamilton Parkway station, where he made a complaint. He was taken to a police station, and after this, accompanied by Sergeant Rooney of the police, went out Fort Hamilton Parkway between Fifty-second and Fifty-third streets, and when opposite defendant, who was on patrol duty, the police sergeant called him over to him. The sergeant testified: "Patrolman Russell was walking on Fort Hamilton avenue in the direction of Sixtieth street, and he had a man in citizen's clothes with him, and I seen them coming toward me before I got right up with them, and I had my chauffeur stop the machine when we got opposite them. I called Russell over to me, over toward the machine, and while he was coming over I got out of the machine on the roadway, and both him and the man in citizen's clothes had their hands in their overcoat pockets. I told them to take their hands out of their pockets. I called Nels Anderson around and placed him opposite the two men, close to a lamp post, a gas lamp that was burning. I asked Anderson if he had seen these men before, and he answered and said, 'Yes, that is the policeman.' I said, 'How about this other man? Have you seen him before?' After a slight hesitation, he says, 'He looks like him.' He immediately followed that with the assertion, 'Yes, that is the man that was with him.' I told the two of them to get into the automobile. They got in the seat with me, in the rear seat, and I put Anderson on the front seat with the chauffeur, and the five of us, with another officer — he stood on the running board — came in to the station house. Q. When he made this statement right in the presence of Officer Russell and this other man, what did Officer Russell and the other man say? Did they make any reply at all? A. Officer Russell said that he never seen this man before."

After a careful reading of the evidence, I am of the opinion that, in view of the obvious condition of complainant at that



time, all uniforms looked alike to him and that he would have identified any person wearing a uniform that the sergeant produced. The only competent evidence upon the trial tending to connect the defendant with the commission of the crime, or even to show that a crime had been committed, was that given by the sailor, to which I have referred, except that a police officer testified to hearing some utterances of the defendant over the telephone, which if made, would tend to corroborate the testimony of the complainant that the defendant did use the telephone after he had accosted him.

There was ill feeling on the part of the captain of the precinct toward the defendant, and without attempting to make any investigation other than to hear the story of the drunken sailor, he informed the defendant, who, so far as the evidence shows, had been a faithful officer for three years, "I think you are guilty. I am going to lock you up." He said he searched the defendant, did not find the watch, but did find several bills, each rolled separately, in defendant's outside coat pocket. Much was made of this fact, though there is no claim that the bills taken from complainant were rolled separately. Defendant denied that he had ever seen the complainant prior to the time he was hailed by Sergeant Rooney in the street and arrested. He denied that the bills referred to were rolled separately, and claimed that they were neatly folded and that he had fifteen dollars and ninety cents in his pocket at the time. He accounts for his movements at the time, and from his testimony it appears that while patrolling his beat and at about ten minutes to three in the morning he heard screams, and while he was investigating, he met Cahill, the codefendant, and shortly afterward one O'Keefe, a special officer engaged in home defense duty. O'Keefe thought the noise might be from a house between Eighth and Ninth avenues, where there had been trouble earlier in the evening. He says that he left his regular post and O'Keefe and Cahill accompanied him to the house, but that it was quiet. If this testimony is true, it accounts for his leaving his post. It was three-thirty A. M. at this time, and defendant reported at box 15 that he was off post. He says that later police whistles were heard, and O'Keefe started down Fortieth street to investigate, while defendant stood on

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Fort Hamilton Parkway and Thirty-ninth street in company with two sailors, five civilians and a milkman. O'Keefe returned, and defendant rang up box 15 again, reporting that he was on police duty and would be unable to get to box 16 in time. Defendant again heard whistles, and hailed a taxicab on Fort Hamilton Parkway, in which defendant, O'Keefe and Cahill rode to Forty-ninth street, where he met Officer Brundrick, who informed him of a fire in another precinct. Defendant's testimony as to his whereabouts at the time when complainant claims that he was robbed is fully corroborated by home defense guard O'Keefe.

The whole case hinges upon the identification of the defendant by the complainant, who must have been intoxicated at the time of the commission of the alleged crime. An officer who drove the automobile in which he was riding at about six o'clock in the morning noticed the odor of whisky on him. He was in a condition, I believe, when he would identify any person the sergeant might point out as the criminal. I agree with the learned justice who granted the certificate in this case, that "There is reasonable doubt whether Anderson was robbed at all." He was not searched, and his testimony in the Magistrate's Court leaves me in doubt as to whether he had a watch. In answer to a question as to what time he had left the dance hall, he said he did not know, "I had no watch," which he qualified by "I didn't look at the watch." There was an entire failure on the part of the People to establish the guilt of the defendant beyond a reasonable doubt, and the judgment of conviction should be reversed for this reason.

There is another reason, however, why this judgment cannot be sustained. Upon the direct examination of Sergeant Rourke, he was permitted to testify over defendant's objection and exception: "He stated to me that he met a patrolman, accompanied by a citizen; that the patrolman told him he was looking for somebody in connection with a murder, and brought him over to a telephone pole and opened the box and said something in the box; that he later closed the door and told him he guessed he was not the fellow, and walked him around several blocks and took him into a hallway and told him to stay there until he would call for him. He stated that

he thought there was something funny, and he took a roll of bills out of his pocket and shoved that down underneath his undershirt, and that after a while the officer came back and went through him and took out three dollars from his pocket and a gold-filled watch and chain, and put back an Ingersoll watch in his pocket — Nels Anderson's. He stated that he told the officer that that was not his watch and he did not want it, and gave it back to him; that the officer then took him outside and told him to go about his business, and that he went up to the elevated station and told the ticket agent." The evidence was hearsay, clearly improper and incompetent. It is true that the court stated that the testimony was admitted subject to its being connected with the defendant, and that if it was not connected it would be stricken out, but this did not mitigate the error. The fact is that it was not stricken out. It was offered for the purpose of strengthening the complainant's story, and the jury were permitted to infer from the fact that it was not stricken out that it had been connected with the defendant.

There is another reason why I think this judgment should be reversed, and in this I speak for myself alone. Sergeant Rooney, while upon the stand was permitted to testify — and I have already referred to his testimony — that Anderson identified defendant. The identity of the defendant was a serious question upon the trial. The weight of the evidence was to the effect that this defendant was not the person who robbed complainant, if he was robbed, and yet upon that material point the People were permitted to show that the complainant identified the defendant as the man who stole his watch and money. This was a violation of the rule established in *People v. Jung Hing* (212 N. Y. 393).

I advise that the judgment of conviction be reversed and a new trial granted.

BLACKMAR, P. J., and MILLS, J., concur; PUTNAM, J., reads for affirmance with whom JAYCOX, J., concurs.

PUTNAM, J. (dissenting):

The feature of this case is that a policeman of three years' service has been convicted of robbing a sailor. When appel-

lant was apprehended he was promptly locked up, and his fellow-officers, including the precinct captain, are witnesses for the prosecution. Such facts suggest a personal animus, which the defense has emphasized, and is one of the considerations moving the majority for reversal.

This precise circumstance, that suggests contrivance on the part of the people's witnesses, however, justifies what would otherwise be a technical error in admitting evidence. Hostility from the other officials may give a coloring of testimony, and even lead one to ask if the narrative of the seaman, Nels Anderson, was not largely a product of suggestion leading him to make out a case against an unpopular fellow-officer. When such discredit is attempted, it is right to show the consistency of the people's witness, by earlier statements before he had become subject to any of these influences. (*People v. Bertini*, 218 N. Y. 584.) In view of this acknowledged principle, I cannot regard it as error to receive evidence of Anderson's original identification, although at a stage of the trial before Anderson had been sought to be discredited. In the *Jung Hing* case the court recognized the exception where the witness is "under the imputation that his story is a recent fabrication." (212 N. Y. 402.) The propriety of this ruling must be tested by the trial as a whole, not by an accidental order of proof which is in the discretion of the trial court. (*People v. Barnes*, 202 N. Y. 77.) Hence in my view there was no error in receiving testimony to the original identification.

This entire case leaves no satisfactory ground to substitute the findings of this court, which reviews upon a printed record, for that of the jurors who saw and heard the witnesses. The testimony of appellant's supporting witness Cahill, in my view, was most damaging; since the narrative of his aimless saunterings with Russell at three A. M. in a November rain storm strains credulity. The issue of identification is one of fact, and no adequate ground is shown to reject the jury's finding. (*People v. Cohen*, 223 N. Y. 406, 423.)

Allowing Police Sergeant Rourke to testify to the declarations of Anderson at four A. M. that morning, when first brought to the police station, is claimed to be error. No identification had then taken place. Its importance was that at the first moment Anderson had made a complaint. He stated that he

had been robbed and described the robber. The objection then raised was that defendant was not present when this complaint was received — an objection that misunderstood the grounds for its admission. It is not necessary to fall back on the rule that in rape, offenses of larceny and such crimes, the fact of an early and prompt complaint by the victim is relevant. (Wigmore Ev. § 1142; Stephens Dig. Ev. art. 8.) A Finnish seaman telling of his robbery by an officer in uniform may properly fall under the exception, by which a prior consistent statement is "receivable to repel the suggestion of recent contrivance, upon a general principle applicable to all witnesses." (Wigmore, § 1762.) These are not objective facts, but merely declarations manifesting a state and attitude of mind, and are, therefore, exceptions to the hearsay rule. (1 Greenl. Ev. § 123.) Hence the objection made that defendant was not present was properly overruled.

As a whole, the trial was fair to appellant, although his counsel sought to call Anderson a Bolshevik.

With no good exception and nowhere any substantial error, I cannot vote to reverse, much as I share in the natural reluctance to condemn one of the city police.

JAYCOX, J., concurs.

Judgment of conviction reversed upon reargument, and new trial granted.

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JAMES MCKAY, Respondent, v. IDA A. NICHOLS, Appellant.

Second Department, June 10, 1921.

**Ejectment — verdict not specifying estate in property recovered informal but not defective — Code of Civil Procedure, § 1519, construed — when judgment not describing property is not defective — costs — plaintiff entitled to costs though partly unsuccessful — defendant not entitled to costs on separate issue — equity rule as to costs not applicable.**

In an action of ejectment in which each side claimed an estate in fee, the defendant also relying on the defense of adverse possession, the verdict of the jury that "The defendant is entitled to the land upon which the house stands and the plaintiff is entitled to the land back of the house along the fence" is informal but not fatally defective.

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Second Department, June, 1921.

While the jury might have been sent back and so have made a more definite finding, especially as to the rear part by the fence, in conformity with the requirement of section 1519 of the Code of Civil Procedure that the verdict shall "specify the estate of the plaintiff in the property recovered," this was not indispensable.

The judgment, therefore, that defendant is "entitled to \* \* \* that portion of the land in controversy upon which the dwelling house of the defendant stands," which was entered upon the aforesaid verdict, is not defective.

Though the plaintiff was in part unsuccessful, he is entitled to full costs. The defendant is not entitled to costs on a separate issue relating to the boundary line, since she did not maintain her claim to a full boundary. While the complaint concluded with a prayer for equitable relief, the rules in equity as to costs are not applicable, since the case was tried as an ejectment action.

APPEAL by the defendant, Ida A. Nichols, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 24th day of November, 1919, on the verdict of a jury; also from parts of said judgment, as resettled, entered in said clerk's office on the 24th day of February, 1920; also from an order entered in said clerk's office on the 19th day of November, 1919, vacating a judgment entered in said clerk's office on the 21st day of October, 1919, and also from an order entered in said clerk's office on the 25th day of October, 1919, denying defendant's motion for a new trial made upon the minutes.

The litigation is over a disputed boundary line between two residence properties on South Broadway in Tarrytown. Beside asking a declaration of title and possession up to a line that passed through about four inches of defendant's house and even more of the yard in the rear, the complaint asked injunctive relief for the removal of encroachments.

*Briggs & Griffin* [*Joseph B. Thompson* of counsel], for the appellant.

*David Ashworth* [*Humphrey J. Lynch* of counsel], for the respondent.

PUTNAM, J.:

The verdict as originally entered was: "The defendant is entitled to the land upon which the house stands and the plaintiff is entitled to the land back of the house along the fence." After denial of a motion for a new trial, the original

judgment was entered. But this was later resettled so as to adjudge to the defendant the land beneath her house, and to plaintiff the gore in the rear by the back fence, these last being described by surveyed lines and as containing twenty-eight and seven-tenths square feet. Plaintiff also taxed full costs.

The first question arises on the regularity of this verdict and the judgment as thereon entered, in view of section 1519 of the Code of Civil Procedure, that the verdict "specify the estate of the plaintiff in the property recovered." While the jury might have been sent back and so have made a more definite finding, especially as to the rear part by the fence, this was not indispensable.\* Here was no question of the respective estates or interests. Each side claimed an estate in fee, the defendant also relying on the defense of adverse possession. The later addition to the Nichols house built in 1892 was set on original foundations which had stood unchanged in site for many years before 1892. Therefore, judgment could properly be entered upon this informal, but plain verdict, which in popular speech settled these differences and validated defendant's building line. As finally resettled, the judgment declared defendant "entitled to \* \* \* that portion of the land in controversy on which the dwelling house of the defendant stands," which is better than to bound this irregular four-inch strip by surveyor's courses. It was certain, and sufficient for all practical purposes. (19 C. J. "Ejectment," § 287.) The judgment as entered was not defective.

Although plaintiff was in part unsuccessful, the recovery rightly carried costs. (Code Civ. Proc. § 3228.) While a defendant in ejectment may be awarded costs on a separate issue (Code Civ. Proc. § 3234), this is not such a case, since defendant did not maintain her claim to a full boundary across, so as to be entitled to costs on this issue. (19 C. J. 1231, § 347.)

While the complaint concluded with a prayer for equitable relief, the cause was not so treated, but was tried as an eject-

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\* Rule 241 of the new Rules of Civil Practice has inserted the words specify "in writing" the estate of the plaintiff in the property recovered, etc., but is a new requirement.—[NOTE BY THE COURT.]

ment action; hence, defendant cannot urge the rules in equity as to costs.

I advise, therefore, that the judgment and orders appealed from be affirmed, with costs.

Present — BLACKMAR, P. J., MILLS, RICH, PUTNAM and JAYCOX, JJ.

Judgment and orders unanimously affirmed, with costs.

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JENNIE LAURA J. STARKE-BELKNAP, Respondent, v. NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

Second Department, June 10, 1921.

**Ejectment — colonial land grant — rule of *stare decisis* observed — grant construed to include land under bays and coves in Hudson river — grant, though to individual, not strictly construed.**

In construing colonial land grants the rule of *stare decisis* will be faithfully observed, since more than private rights are often concerned.

The terms of a colonial land grant, including "in the said Northerly Line all Meadows Marshes Coves Bayes and Necks of Land and Peninsula's that are adjoining or extending into Hudson's River within the Bounds of the said Line," and which grants "fishing in Hudson's river, so far as the bounds of the said lands extends upon the same," aptly express a boundary along the necks or points of land so as to include bays and coves as part of the grant.

Said grant, though to an individual, should be liberally construed in favor of the grantee.

APPEAL by the defendant, New York Central Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 2d day of July, 1918, upon the decision of the court rendered after a trial at the Rockland Special Term in an action of ejectment in which plaintiff was adjudged owner in fee of the premises set forth in the complaint, with \$6,088.18 as damages for withholding the property.

The complaint described two parcels, one to the east and the other to the west of defendant's railroad tracks along the shore



of the Hudson river in the town of Cortlandt, Westchester county, both parcels having originally been below high-water mark, as parts of bays or coves on the eastern side of said river. In straightening its tracks the defendant filled in one of these parcels, and in part appropriated the other parcel under a land grant or patent from the State of New York for this and other submerged lands on the river, dated December 26, 1873. The same question has arisen here as in some Colonial grants in Long Island charters, namely, whether this Royal grant by letters patent of June 17, 1697, to Stephanus Van Cortlandt, creating Cortlandt Manor (Book 7 of Patents, p. 145, office Secretary of State) had included these submerged lands. This patent included lands extending from the Hudson eastward to the Connecticut boundary. It lay between the Manor of Phillipsburgh on the south and the land of Adolph Phillips on the north. The boundary here concerned is the line along the river, which read: "Running along the said Hudsons River Northerly as the said River Runns unto the North side of a high hill in the highlands Commonly Called and knowne by the Name of Anthonys Nose to a Red Cedar Tree which makes the Southermost Bounds of the Land now in the Tenure and Occupacon of Mr. Adolph Phillips including in the said Northerly Line all the Meadows Marshes Coves Bayes and Necks of Land and Peninsula's that are adjoyning or extending into Hudsons River within the Bounds of the said Line." This patent also included lands on the west side of the river (confirming a prior grant by Governor Dongan), which only incidentally concern this appeal. The patent continued: "Know Ye, that of our special grace, certain knowledge and mere motion, we have given, granted, ratified and confirmed, and by these presents do for us, our heirs and successors, give, grant, ratify and confirm unto our said loving subject, Stephanus Van Cortlandt, all of the afore-certain parcel and tracts of land and meadow within their several and respective limits and bounds aforesaid, together with all and every of the messuages, tenements, buildings, barns, houses, out-houses, stables, edifices, orchards, gardens, inclosures, fences, pastures, fields, feedings, woods, underwoods, trees, timber, swamps, meadows, marshes, pools, ponds, lakes, fountains, waters, water courses,

rivers, rivulets, runs, streams, brooks, creeks, harbors, coves, inlets, outlets, islands of meadows, necks of land and meadow, peninsulas of land and meadow, ferries, fishing, fowling, hunting and hawking, *and the fishing in Hudson's river, so far as the bounds of the said lands extends upon the same*, quarries, minerals, (silver and gold mines only excepted), and all the rights, members, liberties, privileges, jurisdictions, pre-eminences, emoluments, to the afore recited certain parcels or tracts of land or meadows within their several and respective limits and bounds aforesaid, belong or in any ways appertaining or accepted, reputed, taken, known or occupied as part, parcel or member thereof, to have and to hold all the afore recited certain parcels and tracts of land and meadows within their several and respective limits and bounds aforesaid, together with all and every of the messuages, tenements, buildings, barns, houses, outhouses, stables, edifices, orchards, gardens, enclosures, fences, pastures, fields, feedings, woods, under-woods, trees, timber, swamps, meadows, marshes, pools, ponds, lakes, fountains, water, water-courses, rivers, rivulets, runs, streams, brooks, creeks, harbors, coves, inlets, outlets, islands of land and meadow, necks of land and meadow, peninsulas of land and meadow, ferries, fishing, fowling, hunting and hawking, and the fishing on Hudson's river as far as the bounds of the said lands extends upon the said river, quarries, mines, minerals, (silver and gold excepted), and all other the rights, members, liberties, privileges, jurisdictions, pre-eminences, emoluments, royalties, profits, benefits, advantages, hereditaments and appurtenances whatsoever to the afore recited certain parcels or tracts of land and meadow within their several and respective limits and bounds aforesaid, belonging or in any ways appertaining or accepted, reputed, taken, known or occupied as part, parcel or member thereof unto the said Stephanus Van Cortlandt, his heirs and assigns, to the sole and only proper use, benefit and behoof of him the said Stephanus Van Cortlandt, his heirs and assigns forever."

The court found and decided that this Royal grant included the coves and bays which are appurtenant to plaintiff's upland, and that, therefore, the State of New York had not title to the premises to make the grant to the defendant, since the State grant of 1873 could not divest the plaintiff and her

predecessors of their prior title to these lands. Defendant appealed from this judgment on July 3, 1918.

*William F. Bleakley*, for the appellant.

*Frank M. Avery* [*Earl A. Darr* with him on the brief], for the respondent.

PUTNAM, J.:

Regarding few questions should the rule of *stare decisis* be more faithfully observed than on the interpretation of crown grants involving shore and water rights. More than private rights are often concerned; and where a construction has been deliberately adopted and declared, it should not be disturbed save by the court of last resort. Colonial grants on Long Island have been adjudged to include the lands under bays and harbors. (*Robins v. Ackerly*, 91 N. Y. 98; *Tiffany v. Town of Oyster Bay*, 209 id. 1; *Grace v. Town of North Hempstead*, 166 App. Div. 844; *affd.*, 220 N. Y. 628.) In this boundary line the words "Coves bayes and Necks of Land" more clearly describe and convey indentations in a river's course than did the formula "Havens, Harbors, Rivers, Creekes, Woodland, Marshes" in *Grace v. Town of North Hempstead* (*supra*), or the phrase "including all the Necks of Land and Islands within the aforesd described Bounds and Limmitts" in *Tiffany v. Town of Oyster Bay* (*supra*). To appellant's contention that this grant, being to an individual, should have a strict construction, there are two answers: *First*. This grant is in a special form. It was of old held that in a suit to revoke a crown patent, the recitals of facts not within the knowledge of the government are regarded as the suggestions of the patentee. The King is not estopped by a recital of his patent, but the law will rather adjudge him to be deceived. (*Case of Alton Woods*, 1 Coke, 43.) So Blackstone says that because a royal grant made at the suit of the grantee is to be taken most beneficially for the king, "it is usual to insert in the king's grants, that they are made, not at the suit of the grantee, but '*ex speciali gratia, certa scientia, et mero motu regis*' (by the special favor, certain knowledge, and mere motion of the king); and then they have a more liberal construction" (Comm. bk. II, p. 347), which is the formula of this Van

Cortlandt grant. *Second.* Such crown grants have long received this liberal construction in New York even in a controversy that aroused great public feeling (*People v. Van Rensselaer*, 9 N. Y. 291, 322), and later in a royal grant of lands under tidal waters. (*DeLancey v. Piepgras*, 138 N. Y. 26.) We are familiar also with the grant of appurtenant rights of "fishing, fowling, hunting and hawking." But here a new and significant clause follows this stereotyped enumeration of rights of sport — "and the fishing in Hudson's river, so far as the bounds of the said lands extends upon the same." The franchise of "ferries" involves more than a mere upland right. These terms taken together aptly express a boundary along the necks or points of land so as to include bays and coves as part of this manor. And this construction is not against the rule in *Sage v. Mayor* (154 N. Y. 61), which dealt with the New Harlem charter from Governor Nichols. This granted lands "bounded on one side by the 'Harlem River or any part of the said river on which this land' (of Manhattan) 'doth abut \* \* \* together with all the soils, creeks, quarries, woods, meadows, pastures, marshes, waters, lakes, fishing, hawking, hunting and fowling and all other profits, commodities, emoluments and other hereditaments belonging to the said lands and premises within the said bounds and limits set forth, belonging or in anywise appertaining.' " (pp. 62, 63.) This reference to the bounds and limits was held not to extend the grant out into the river, or beyond its western bank. But "Meadows," "pastures" and "marshes" there used describe land. Coves, bays and inlets are to describe parts of the river and the lands beneath. Furthermore the right to fish in this river is expressly granted so far as the bounds extend "upon" the river — which seems to me conclusive.

Hence, I advise that the judgment be affirmed, with costs.

Present — BLACKMAR, P. J., MILLS, RICH, PUTNAM and JAYCOX, JJ.

Judgment unanimously affirmed, with costs.

MARY GOLDER and Others, Plaintiffs, Impleaded with  
ROSANNA FROST, Appellant, v. JULIA E. FOWLER and  
Others, Respondents.

Second Department, June 10, 1921.

**Partition — proof of succession not shown — defendants acquired  
title by adverse possession.**

In an action of partition it appeared that the land was owned by the original ancestor of the plaintiffs, but the plaintiffs failed to show that said ancestor died seized of the land or that plaintiffs' father or their grandfather was the heir at law of said original ancestor; that said land was in possession of a third person from 1848 to 1891, when he sold the land in question to the defendants' predecessors by full covenant deed, and that since 1891 the defendants' possession and that of their predecessors has been open, exclusive, hostile, notorious and adverse, and that this action was commenced in 1919.

*Held*, that the judgment of the lower court dismissing the complaint should be sustained on the ground that the plaintiffs failed to show that the original ancestor died seized of the premises or that the plaintiffs' father or grandfather were heirs at law of the original ancestor, and that the defendants and their predecessors had held the land adversely for more than twenty years.

APPEAL by the plaintiff, Rosanna Frost, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Nassau on the 7th day of April, 1920, upon the decision of the court rendered after a trial at the Nassau Special Term.

*Charles Driggs Lewis*, for the appellant.

*William F. Fowler*, for the respondents Julia E. Fowler and Alice A. Hutcheson.

*Francis G. Hooley*, for the respondents Morris Mott and others.

PUTNAM, J.:

This suit proceeded on the theory of the continued rights of a tenant in common toward the cotenants notwithstanding the ordinary Statute of Limitations. The plaintiffs are the

six daughters of Oliver Pearsall who claims to have been the son of Anthony Pearsall.

Hallett Pearsall, the original ancestor, owned about eight acres of farm lands in Lynbrook, Hempstead, along the south side of the Old Jamaica and Merrick plank road. He died in 1830, intestate. But it does not appear that he died seized of this land. It is assumed that he left four sons, David, Anthony, Peter and Oliver, which inference is supported by a deed from Peter Pearsall and wife to David Pearsall, dated July 20, 1848, purporting to convey an equal undivided quarter interest in the premises in suit, described as formerly belonging to Hallett Pearsall, deceased.

The plaintiffs' theory depends on showing that a quarter interest passed to the son Anthony; that Anthony died intestate about July, 1859, seized of this quarter interest, leaving three brothers, David, Oliver and Peter, his heirs at law.

Plaintiffs as representing the heirs of Oliver Pearsall (who is claimed to have had one undivided twelfth) thus claim to have each an undivided one-seventy-second share in these premises.

The court found that since the 1848 conveyance above, David Pearsall occupied the premises and, up to January 7, 1891, lived thereon, and for a portion of that time had a store thereon.

During that period (1848-1891) David Pearsall rented portions of the premises to defendants Morris Mott, Julius Mott and others, and received the rentals thereof himself. Another finding is that the premises were inclosed by a fence during the period — 1848-1891 — also that in this period David paid the taxes assessed against said premises. There is also a negative finding that during this period Oliver Pearsall, plaintiffs' father, never claimed any interest in said premises nor exercised any dominion thereover; that during this time David Pearsall was generally reputed to own these premises.

On January 7, 1891, David Pearsall executed a full covenant deed to the defendants Mott of about four acres of these premises, which deed was recorded on January 8, 1891.

On February 12, 1891, David Pearsall conveyed to the **Motts**

by full covenant deed dated on that day, also duly recorded, another portion of these premises. About February 16, 1891, he conveyed to the Motts the remainder of these premises, which conveyance was recorded. Thus, on or before February 16, 1891, he had asserted acts of exclusive ownership as to all this property against any cotenants, which acts may be deemed to set running the Statute of Limitations. (See Code Civ. Proc. § 369 *et seq.*) Oliver Pearsall died in 1902. At that time all six plaintiffs were of full age, so there was no break in the running of the Statute of Limitations. The present action was begun October 10, 1919, over twenty-eight years after these conveyances.

Since 1904 streets have been laid out in the premises, fourteen or fifteen dwellings erected there. During these years the defendants, who have lived within a few miles of the property, have made no claim, and have asserted no rights or interest in same, until 1910, when actions were brought and dropped for lack of prosecution.

The court found that the defendants' possession and that of their predecessors in interest "since the year 1891, has been open, exclusive, hostile, notorious and adverse." The judgment and decision of the learned court at Special Term should, therefore, be sustained upon the following grounds, namely: 1. The failure to prove that Hallett Pearsall died seized of these premises. 2. The omission to show that either plaintiffs' father, Oliver Pearsall, or their grandfather, Anthony Pearsall, was an heir at law of Hallett Pearsall. 3. The open, notorious, adverse possession of defendants and their predecessors, maintained since 1891.

Hence I advise that the judgment be affirmed, with costs.

Present — BLACKMAR, P. J., MILLS, PUTNAM, KELLY and JAYCOX, JJ.

Judgment unanimously affirmed, with costs.

In the Matter of Proving the Last Will and Testament of  
ARTHUR HENRY GAFFKEN, Deceased.

MARY LOUISE GAFFKEN, Appellant; JOHN C. BORGES,  
Respondent.

Second Department, June 10, 1921.

**Wills** — will made in 1914 with devise to woman whom decedent subsequently married and to another but with no provision as to issue — death of testator in 1920 leaving widow and child — will not revoked by subsequent marriage — Decedent Estate Law, § 35, as amended by Laws of 1919, chapter 293, applicable.

Testator executed his will in 1914 by which he gave one-third of his estate to the woman who two days later became his wife, and two-thirds to his mother, and in 1920 died leaving him surviving his widow and one son. *Held*, that section 35 of the Decedent Estate Law, as amended by chapter 293 of the Laws of 1919, providing that if after the making of any will such testator marries, and the husband or wife, or any issue of such marriage, survives the testator, such will shall be deemed revoked as to them unless provision is made for them, or they are mentioned in such way as to show an intention not to make such provision, applies in determining the meaning and effect of the will;

That the will may be read as having provided for the widow by the antenuptial bequest and, therefore, it was not revoked as to her by the testator's subsequent marriage.

APPEAL by the contestant, Mary Louise Gaffken, from a decree of the Surrogate's Court of Kings county, entered in the office of the clerk of said court on the 21st day of February, 1921, admitting to probate the paper propounded as the last will and testament of Arthur Henry Gaffken.

The main question turns on the change in the Decedent Estate Law (§ 35, as amd. by Laws of 1919, chap. 293) as to the effect of a marriage of the testator and birth of a son after execution of a will.

*Herbert Parsons*, for the appellant.

*Harry W. Kouwenhoven*, for the respondent.

PUTNAM, J.:

On June 12, 1914, testator made the will probated, in which he gave one-third of his estate to Mary Louise Krom, and

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the remaining two-thirds to his mother, Adelheid Gaffken, and appointed executors. On June fourteenth (two days later) he married this Mary Louise Krom, to whom on February 3, 1916, was born the son, William Eugene. Testator died December 10, 1920, leaving as surviving his mother, wife and son. No question is made as to the son, since he stands with the full rights as if the father died intestate.

Before September 1, 1919, there survived in New York an old distinction between husband and wife as to revocation of wills. As to a man, his marriage with birth of issue, worked an inferential revocation of a will executed before marriage. (Decedent Estate Law, § 35; re-enacting R. S. pt. 2, chap. 6, tit. 1, art. 3 [2 R. S. 64], § 43.) As to an unmarried woman, marriage alone revoked a prior will. (Decedent Estate Law, § 36; re-enacting R. S. pt. 2, chap. 6, tit. 1, art. 3 [2 R. S. 64], § 44; *Forse & Hembling's Case*, 4 Coke Rep. 61.) This disparity was removed in England by the Statute of Wills (7 Wm. IV & 1 Vict. chap. 26, § 18, taking effect in 1838). (See 3 Jarman Wills [Am. ed. 1881], p. 783.) This sex equality as to revocation did not have full recognition in New York until 1919. The essential difference, however, is the effect of this inferential revocation. The earlier authorities regarded marriage and issue (or without issue, in case of a woman) as countermanding the entire will. Thus in *Forse & Hembling's Case* (*supra*) the court said: "This taking of husband being, in the case at bar, her proper act, shall amount to a countermand in law." (61 b.)

The history of the gradual recognition of the doctrine of a presumed revocation is shown in *Brush v. Wilkins* (4 Johns. Ch. 506).

By the law in force in 1912 (Decedent Estate Law [Consol. Laws, chap. 13; Laws of 1909, chap. 18], § 35), which took effect on February 17, 1909, revocation was inferred from marriage and birth of issue "unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision." The 1919 amendment with more exact discrimination left only a partial revocation. (Laws of 1919, chap. 293.) It read:

" § 35. Revocation by marriage. If after making any will, such testator marries, and the husband or wife, or any issue of such marriage, survives the testator, such will shall be deemed revoked as to them, unless provision shall have been made for them by some settlement, or they shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and such surviving husband or wife, and the issue of such marriage, shall be entitled to the same rights in, and to the same share or portion of the estate of said testator as they would have been, if such will had not been made. No evidence to rebut such presumption of revocation shall be received, except as herein provided." This act of 1919 also repealed section 36 of the Decedent Estate Law, which provided that "A will executed by an unmarried woman, shall be deemed revoked by her subsequent marriage."

Mrs. Gaffken, the appellant, would naturally benefit under the earlier wording of section 35, in force when the will was executed. The will did not provide for issue, and made no mention thereof, and showed no intention to disinherit. This would lead to a complete revocation according to the earlier statute.

By act of 1919 this is otherwise, because the will may be read as having provided for the widow, by the ante-nuptial bequest.

Which law prevails — the statute in force at time the will is executed, or that at testator's death?

Although a will is ambulatory, so long as the testator lives, and only becomes effective at his death (*Voluntas est ambulatoria usque extremum vitae exitum*), there is respectable authority for the view that the law in force at time of execution controls the requirements of formalities and attestation. (*Packer v. Packer*, 179 Penn. St. 580.)

But for the meaning and effect of the will we are to look to the law at time of the testator's death. (*Wynne's Lessee v. Wynne*, 2 Swan [Tenn.], 405 [1852]; *Price v. Taylor*, 28 Penn. St. 95, 107; *Obecný v. Goetz*, 116 App. Div. 807, 808; *Matter of Cutler*, 114 Misc. Rep. 203; *Matter of Schuster*, 111 id. 534; *Lorieux v. Keller*, 5 Iowa, 196.) Otherwise new legislation would never begin to take effect until after the prior wills had been outlived.

Hence, I advise that the decree of the Surrogate's Court of Kings county be affirmed, with costs to all parties appearing, payable out of the estate.

BLACKMAR, P. J., MILLS, RICH and JAYCOX, JJ., concur.

Decree of the Surrogate's Court of Kings county affirmed, with costs to all parties appearing, payable out of the estate.

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JAMES O. ROBINSON, Appellant, v. ST. JOHN'S GUILD and  
CEDAR GROVE BEACH CORPORATION, Respondents.

Second Department, June 10, 1921.

**Injunction — suit to enjoin maintenance of obstruction in right of way — after dominant and servient tenements vest in one person subsequent grant does not revive right of way — plaintiff not entitled to mandatory injunction on pleadings.**

In a suit to enjoin the maintenance of a fence and other obstructions in an alleged right of way it appeared that the conveyance to the plaintiff made no reference to the right of way and did not contain any grant of an easement, that there was no public acceptance of the dedication of the alleged right of way and no averment of such a continuous user as would make out a subsisting private easement, also that the dominant and servient tenements had become vested in a predecessor in title.

*Held*, that when the dominant and servient tenements were merged and the rights were unified in the title of the predecessor, the subsequent conveyances by said predecessor referring to the "aforesaid deed to the party of the first part" did not regrant or revive the right of way;

That the plaintiff was not entitled to a mandatory injunction on the complaint and demurrer for insufficiency, since that can be granted only where the allegations of the complaint are so technically correct as to obviate the necessity of proof to exclude the exercise of the court's discretion.

APPEAL by the plaintiff, James O. Robinson, from an order of the Supreme Court, made at the Richmond Special Term and entered in the office of the clerk of the county of Richmond on the 26th day of June, 1920, denying plaintiff's motion for judgment on the pleadings in a suit to enjoin the maintenance of a fence and other obstructions in an alleged right of way in the fourth ward of the borough of Richmond (formerly the town of Southfield).

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Second Department, June, 1921.

Defendants had separately demurred to the complaint for insufficiency.

*L. W. Widdecombe*, for the appellant.

*Joseph Larocque*, for the respondent St. John's Guild.

*John G. Clark*, for the respondent Cedar Grove Beach Corporation.

PUTNAM, J.:

Plaintiff's conveyance has no reference to any right of way from Cedar Grove avenue to the beach, and contains no grant of an easement in defendants' lands. His pleading does not show him entitled to a mandatory injunction to remove fences and buildings which closed this way in 1906, fourteen years before bringing this suit and ten years before his purchase of lands to the westward of these lots. Furthermore, there was no public acceptance of the dedication of 1847, and no averment of such a continuous user as would make out a subsisting private easement. When dominant and servient tenements met and the rights were unified in the title of Susan A. Burbank, in whom all of lot No. 7 became vested in 1874, the subsequent conveyances referring to the "aforesaid deed to the party of the first part," taken in connection with the facts then appearing, did not regrant or revive this right of way. (*Wheeler v. Clark*, 58 N. Y. 267; *Parsons v. Johnson*, 68 id. 62.) Unless all the allegations of the complaint are so technically correct as to obviate the necessity of proof to exclude the exercise of the court's discretion, a mandatory injunction should not be granted by means of such a motion upon the pleadings.

I advise, therefore, that the order be affirmed, with ten dollars costs and disbursements, and with leave to amend the complaint on payment of costs.

BLACKMAR, P. J., MILLS, KELLY and JAYCOX, JJ., concur.

Order affirmed, with ten dollars costs and disbursements, with leave to amend the complaint on payment of costs.

IKE EDELSTEIN, Respondent, v. IGNATZ SPIELBERGER,  
Appellant.

First Department, June 3, 1921.

**Contracts — action to recover balance due on sale of corporate stock — contract providing that on default amount paid on stock shall be liquidated damages — liquidated damages cannot be stipulated where damages are certain — complaint not demurrable for insufficiency.**

A provision in a contract for the sale of corporate stock, payment to be made in installments, that on default of the buyer the amount so paid on the contract shall be considered as liquidated damages, is not of any force for the parties to a contract can only provide for the liquidation of damages in case the damages are uncertain, speculative or difficult of computation; the damages for violation of this contract are certain and capable of exact computation.

Accordingly, the complaint in an action to recover the balance due on said stock which sets out the provision in reference to liquidated damages is not demurrable for insufficiency inasmuch as said provision is ineffectual to foreclose the plaintiff's right to recover the balance due.

LAUGHLIN and GREENBAUM, JJ., dissent, with opinion.

APPEAL by the defendant, Ignatz Spielberger, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of November, 1920, overruling the defendant's demurrer to the complaint.

*Charles H. Herbst*, for the appellant.

*J. M. Poss* of counsel [*Nathan Friedman*, attorney], for the respondent.

PAGE, J.:

The complaint alleges that the plaintiff and defendant entered into an agreement in writing on January 5, 1920, wherein the defendant agreed to purchase from the plaintiff fifty shares of the capital stock of a corporation known as Greenfield Cohen, Inc., then in possession of the plaintiff,

and fifty shares of the stock of the same company contracted for by the plaintiff but which had not been at that time delivered to him, in consideration of the sum of \$10,750 to be paid \$1,000 on January 5, 1920; \$4,000 on or before January 15, 1920; \$5,000 on or before February 15, 1920; and \$750 by delivering a promissory note payable on or before March 15, 1920. By the terms of the agreement which is annexed to the complaint and made a part thereof, it was provided as follows:

*"Second.* It is agreed that until final payments are made in pursuance to the terms of this contract, that the certificate of stock for fifty (50) shares of stock now owned by the party of the first part shall be deposited with Nathan Friedman, of 309 Broadway, New York City, endorsed in blank, to be held by the said Nathan Friedman until the final payments are made by cash and note, at which time, upon such final payments, the said stock shall be turned over to the party of the second part, and at which time, the party of the first part will execute an assignment of his claim to the other fifty (50) shares of stock above mentioned, to the said party of the second part."

*"Fifth.* It is agreed that in the event of the failure of the party of the second part to make any of the payments provided for herein, then and in that event, the monies already paid on account shall be retained by the party of the first part, as and for liquidated damages, and the stock owned by him shall continue to be his sole property and the party of the first part may enforce any and all rights which he has under and in pursuance to the agreement of April 19th, 1919."

The complaint then alleges that the plaintiff received on account of the purchase price of said shares the sum of \$5,000, and that the defendant failed and refused to pay \$5,750 although duly demanded and although the said stock was duly tendered, together with an assignment of the plaintiff's rights to the fifty shares of stock not yet owned by him, and that plaintiff otherwise duly performed all the terms, covenants and conditions of the agreement on his part to be performed; and that shortly after the 15th day of February, 1920, a petition in bankruptcy was filed against said Greenfield Cohen, Inc., and thereafter the assets of said corporation were sold

to satisfy the claims of creditors, and the stock became totally worthless. Judgment is demanded for \$5,750. The defendant demurred to the complaint on the ground of insufficiency.

The claim of the defendant is that under the 5th paragraph of the agreement above set forth, upon the failure of the defendant to perform the contract on his part by making the payments in accordance with the contract, the plaintiff is entitled to retain any moneys paid as liquidated damages, and that, therefore, it appears upon the face of the complaint that the plaintiff has no cause of action to recover the balance due. It is true that the agreement so provides, but the parties to a contract can only provide for the liquidation of damages in case the damages are uncertain, speculative or difficult of computation; and where the contract calls for the sale of personal property, payment to be made in installments, and certain installments are paid on account, and the defendant defaults on subsequent payments, the damages are certain and liquidated by law. It is not necessary or proper for the parties to provide for the forfeiture of the amount already paid as liquidated damages. The damages in this case are certain and capable of exact computation and are not speculative.

The order should be affirmed, with ten dollars costs and disbursements.

DOWLING and MERRELL, JJ., concur; LAUGHLIN and GREENBAUM, JJ., dissent.

LAUGHLIN, J. (dissenting):

It is also recited in the agreement upon which this action was predicated that on the 19th of April, 1919, an agreement was made between the plaintiff herein and one Isaac Cohen and the defendant, by which Cohen and the defendant agreed to sell and deliver to the plaintiff one hundred shares of the capital stock of Greenfield Cohen, Inc., and that fifty shares of the stock had been fully paid for and delivered to the plaintiff and that the remaining fifty shares were to be delivered to him upon certain payments made and to be made by him to them and that the defendant was desirous of purchasing the fifty shares, which had been paid for and

delivered to the plaintiff and all of the plaintiff's rights to the remaining fifty shares for which plaintiff had paid in part but which had not been delivered to him. This is an action on the contract made between the plaintiff and defendant on the 5th of January, 1920, to recover the balance of the purchase price of the stock which the defendant by that contract agreed to pay. As I construe the 5th paragraph of that agreement, quoted in the opinion of Mr. Justice PAGE, in the event that the defendant failed to make any of the payments which it was therein provided he should make, it was agreed that the stock should remain the sole property of the plaintiff and that the defendant should forfeit to the plaintiff as liquidated damages all moneys theretofore paid on account of the purchase price of the stock and that the plaintiff might enforce any and all rights which he had under and pursuant to the agreement of April 19, 1919, to which reference has been made, which was not to be deemed abrogated by the later agreement of January 5, 1920, unless there was full performance thereof by the defendant. Defendant having failed to make all of the payments as provided in the agreement of January 5, 1920, forfeited his right to acquire the stock thereunder; and being thus guilty of a breach of the contract, he could maintain no action thereon either for the recovery of the stock or of the payments which he had made on account of the purchase price thereof. (*Page v. McDonnell*, 55 N. Y. 299; *Lawrence v. Miller*, 86 id. 131; *Chaude v. Shepard*, 122 id. 397.) By this agreement, therefore, the parties merely stipulated their legal rights with respect to the stock in the event of a breach of the contract by the defendant in accordance with settled law applicable to such a breach. I think that the effect of the agreement was to relieve defendant from making any further payment for the stock in case he made default and that in that event the plaintiff was relieved of any obligation with respect to selling and delivering the stock to the defendant under that agreement of April 19, 1919. As I view the case, it was optional with the defendant whether to continue making the payments and thereby acquire the right to the delivery of the stock to him or to forfeit such right by defaulting with respect to all, and in that event plaintiff could maintain no action against



the defendant for the balance of the purchase price. That is the sole point presented for decision on this appeal for I think we are not now concerned with the validity of the stipulation of the parties to the effect that the plaintiff might retain all payments made by the defendant as liquidated damages. I am of opinion, therefore, that the complaint fails to state a cause of action and that the demurrer thereto on that ground was well taken and should have been sustained and that the order should be reversed, with ten dollars costs and disbursements, and the demurrer sustained, with ten dollars costs.

GREENBAUM, J., concurs.

Order affirmed, with ten dollars costs and disbursements.

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VAN LOAN WHITEHEAD, Individually, and VAN LOAN WHITEHEAD and JAMES M. GIFFORD, as Executors, etc., of HARRIET WHITEHEAD, Late of the County of New York, Deceased, and as Trustees of the Trusts Therein Created, Respondents, v. HARRIET C. GINSBURG, Appellant, Impleaded with CATHERINE WHITEHEAD and WILLIAM WHITEHEAD, Respondents, and Others, Defendants.

First Department, June 3, 1921.

**Wills — trusts — provision that on death of beneficiary income shall be paid to lineal descendants in equal shares — grandchildren of deceased son of beneficiary take per stirpes and not per capita where daughter of beneficiary living.**

Under a will bequeathing property in trust, a portion of the income to be paid to Mary E. Yates, who is still living, and the balance to two sons of the testatrix, which provided "in case of the decease of either of my sons during the life of said Mary E. Yates, to pay the share of dividends to which my said sons would have been entitled, to the lineal descendants of such deceased son in equal shares. On the decease of said Mary E. Yates, then I direct my executors to divide said stock equally between my said sons the lineal descendants of any deceased son to be entitled to the portion to which their parent would have been entitled if living,"

grandchildren of a deceased son take *per stirpes* and not *per capita*, where a daughter of said son is living.

While the event has not occurred which requires a construction of the latter portion of the clause, still that portion should be taken into consideration in determining the intention of the testator concerning the disposition of the income prior to the termination of the trust estate.

SMITH, J., dissents, with opinion.

APPEAL by the defendant, Harriet C. Ginsburg, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 20th day of April, 1920, upon the decision of the court rendered after a trial at the New York Special Term.

Harry L. Horwitz [*Louis Ferkin* with him on the brief], for the appellant.

Alfred P. W. Seaman of counsel [*Gifford, Hobbs & Beard*, attorneys], for the plaintiffs, in behalf of appellant.

J. Teller Schoolcraft, for the respondents.

PAGE, J.:

Harriet E. Whitehead died on September 9, 1911, a resident of the county of New York, leaving a last will and testament dated August 20, 1904, which was duly admitted to probate on November 16, 1911. This is an action by Van Loan Whitehead, individually, and by the executors of said will and trustees of the trusts therein created, for a construction of the 5th clause of the will which, so far as material to this appeal, reads as follows:

"*Fifth.* I give and bequeath all the stock owned by me in the corporation known as Whitehead Brothers Company, to my executors hereinafter named, IN TRUST, HOWEVER, to receive and collect the dividends from time to time declared thereon, and to pay from such dividends the sum of Twenty-five Dollars (\$25.00) monthly to my sister-in-law, MRS. MARY E. YATES of Old Bridge, New Jersey, during the term of her natural life, and to divide the balance of said dividends equally between my said sons; and in case of the decease of either of my sons during the life of said Mary E.

Yates, to pay the share of dividends to which my said sons would have been entitled, to the lineal descendants of such deceased son in equal shares.

"On the decease of said Mary E. Yates, then I direct my executors to divide said stock equally between my said sons the lineal descendants of any deceased son to be entitled to the portion to which their parent would have been entitled if living."

The testatrix left her surviving two sons, Van Loan Whitehead, one of the plaintiffs herein, and Lydell Whitehead, who died on February 4, 1915, leaving him surviving a daughter, Harriet C. Whitehead (now Harriet C. Ginsburg, the defendant, appellant, herein), and a son William Whitehead, 2d. At the time of the death of Lydell Whitehead his son had living a daughter, Catherine Whitehead, born September, 1907. Thereafter, on August 23, 1917, there was born to William Whitehead, 2d, a son, William Whitehead.

At the time of her death the testatrix owned 252 shares of the preferred and 252 shares of the common stock of Whitehead Brothers Company, a New Jersey corporation, which is the stock referred to in the 5th clause of the will.

During the lifetime of Lydell Whitehead dividends received on said stock, after the payment of twenty-five dollars per month to Mary E. Yates, were divided equally between Van Loan Whitehead and Lydell Whitehead. After the death of Lydell Whitehead one-half was paid to Van Loan Whitehead and one-quarter each to Harriet C. Ginsburg and William Whitehead, 2d. No part of the dividends was paid to the children of William Whitehead, 2d, the trustees treating the provision of the will as requiring a distribution *per stirpes* to the lineal descendants of Lydell and not *per capita* among them. Mary E. Yates, upon whose life the trust is limited, is still living.

The court at Special Term has construed the 5th clause of the will as requiring a distribution of that portion of the income which was to be paid to Lydell Whitehead among his lineal descendants *per capita* as follows:

From February 4, 1915, the date of the death of Lydell, to August 23, 1917, into three equal shares to Harriet C. Ginsburg, William Whitehead, 2d, and Catherine Whitehead;

from August 23, 1917, the date of the birth of William Whitehead, to May 22, 1918, into four equal shares, among Harriet C. Ginsburg, William Whitehead, 2d, Catherine Whitehead and William Whitehead; from May 22, 1918, the date of the death of William Whitehead, 2d, to the present time, into three equal shares between said Harriet C. Ginsburg, Catherine Whitehead and William Whitehead.

The learned justice at Special Term arrived at the conclusion from a consideration only of that portion of the 5th clause of the will that related to the distribution of income giving no consideration to that portion which provided for the distribution of the principal on the termination of the trust. Although, as he correctly states, the event has not occurred which requires a construction of the latter portion of the clause, yet where the question is the intention of the testator the whole will is to be read and any portion that throws light upon the meaning of the provisions directly involved should be taken into consideration. As to the 1st clause of the will, "standing alone the law would give it a certain meaning, but it would do so only in obedience to a supposed intent. If by the light reflected from other provisions a different intent is discoverable, the reason of the rule fails and a different result is reached." (*Hoppock v. Tucker*, 59 N. Y. 202, 209.) That the principal of the estate is to be divided "equally between my said sons the lineal descendants of any deceased son to be entitled to the portion to which their parent would have been entitled if living," clearly shows that as to principal the distribution was to be *per stirpes* and not *per capita*. If the trust should terminate immediately, therefore, Van Loan Whitehead would receive one-half of the principal, Harriet C. Ginsburg one-quarter, and Catherine Whitehead and William Whitehead each one-eighth.

It would require explicit language to show that the testatrix intended the income during the administration of the trust to be divided among the lineal descendants of the deceased son *per capita* and the principal *per stirpes*. Equality of distribution was the dominant thing in the testatrix's mind. Her sons were to share equally in the income. The lineal descendants of the deceased sons were to take in equal shares, and what she intended these words to mean is shown by the

concluding words of the clause, the lineal descendants "to be entitled to the portion to which their parent would have been entitled if living."

The use of the words "in equal portions," when applied to the issue of a deceased beneficiary, has been held sufficient to show an intent that the issue should take *per stirpes* and not *per capita*. (*Matter of Union Trust Co.*, 170 App. Div. 176, 178; *affd.*, 219 N. Y. 537.) [While the Court of Appeals has been very tenacious of the rule declared in *Soper v. Brown* (136 N. Y. 244, 250), that "under a gift to 'issue' where the word is used without any terms in the context to qualify its meaning, the children of the ancestor and the issue of such children, although the parent is living, as well as the issue of deceased children, take in equal shares *per capita* and not *per stirpes*, as primary objects of the disposition," the courts have been astute to discover some faint glimpse of a contrary intention in order to escape applying the rule. (See cases cited in *Petry v. Petry*, 186 App. Div. 738, and in addition *Matter of Durant*, 231 N. Y. 41.) In passing we might observe that although the Court of Appeals was not impressed by the unanimous request of this court that they should reverse the rule declared in *Soper v. Brown* (*supra*) and adopt instead the Massachusetts rule (*Dexter v. Inches*, 147 Mass. 324; *Jackson v. Jackson*, 153 id. 374; *Coates v. Burton*, 191 id. 180; *Silsbee v. Silsbee*, 211 id. 105), and refused to consider the request (*Petry v. Langan*, 227 N. Y. 621), the Legislature has adopted the latter rule, by adding to the Decedent Estate Law section 47a which provides: "If a person dying after this section takes effect shall devise or bequeath any present or future interest in real or personal property to the 'issue' of himself or another, such issue shall, if in equal degree of consanguinity to their common ancestor, take *per capita*, but if in unequal degree, *per stirpes*, unless a contrary intent is expressed in the will." (Laws of 1921, chap. 379, in effect April 30, 1921.) Hereafter courts will be relieved of the necessity of searching for "faint glimpses" and "slight traces" in order to give effect to what they believe to be the intention of the testator.]

In the case under consideration the words "lineal descendants" are synonymous with "issue." (*Schmidt v. Jewett*, N. Y. 486.) Reading the 5th clause of the will as a whole

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it is my opinion that it sufficiently shows that this testatrix intended that the income should be distributed to the descendants of her deceased son *per stirpes* and not *per capita*.

The findings as conclusions of law will be reversed, and the judgment modified in accordance with this opinion, and as modified affirmed, with costs to all parties appearing and filing briefs in this case, payable out of the fund in the same manner as the costs are directed to be paid by the judgment. Submit order containing new conclusions of law.

CLARKE, P. J., LAUGHLIN and MERRELL, JJ., concur;  
SMITH, J., dissents.

SMITH, J. (dissenting):

Recognizing the rule that the presumption in this State favors a *per capita* distribution, and that the presumption yields to a very faint glimpse of a different intention (*Matter of Farmers' Loan & Trust Company*, 213 N. Y. 173, 174), I am unable to find from the record any glimpse of a different intention. The distribution of the surplus dividend is directed to be given "to the lineal descendants of such deceased son *in equal shares*." Immediately thereafter, in the next paragraph, the will provides for a distribution of the corpus of the trust fund after the death of Mary E. Yates. This distribution is directed "equally between my said sons the lineal descendants of any deceased son to be entitled to the portion to which their parent would have been entitled if living." There appears to be no reason why the direction for the *per stirpital* division which governs the distribution of the corpus of the fund should not have been included in the provision for the distribution of the surplus income, if the testator had so desired. In fact, the contrary intention would seem to be indicated by the omission. We have no knowledge of the reason why a different direction has been given for the distribution of the surplus income and of the principal. Nor with that reason are we concerned, unless there be something in the will to indicate an intention for the distribution of the surplus income among the lineal descendants of the deceased son otherwise than an *equal* distribution thereof as directed. While the courts of this State recognize the rule of *per capita*

distribution where the contrary intent is not in some way indicated, effect must be given to that rule, and the rule should not be disregarded in this case unless we can find some intent to apply a different rule to the distribution of this surplus income from that which is, as I view it, both presumed and directed by the will.

I vote for affirmance.

Judgment modified as directed in opinion and as so modified affirmed, with costs to all parties appearing and filing briefs payable out of the fund. Settle order on notice.

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EDWARD J. BAIRD, Respondent, v. GRACE CHURCH OF MILLBROOK, Sued Herein under the Fictitious Name of "THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF GRACE CHURCH, MILLBROOK, IN THE TOWN OF WASHINGTON, COUNTY OF DUTCHESS AND STATE OF NEW YORK, A RELIGIOUS CORPORATION," Appellant.

Second Department, June 17, 1921.

**Religious corporations — Protestant Episcopal church — action for breach of contract engaging plaintiff as rector — complaint states facts sufficient to constitute cause of action — motion by defendant for judgment on pleadings — denials and new matter in answer not available where reply admitting new matter not interposed.**

Complaint in an action against a Protestant Episcopal church for breach of contract by which the plaintiff was engaged to act as rector examined, and held, that a motion by the defendant for judgment on the pleadings upon the ground that the complaint does not state facts sufficient to constitute a cause of action should be denied, though the complaint contains many averments which are not facts, making it subject to criticism under sections 545 and 546 of the Code of Civil Procedure.

On a motion by a defendant for judgment on the pleadings consisting of the complaint and an answer containing denials and separate defenses, the denials do not aid the defendant, and the allegations of new matter in the separate defenses cannot be considered where no reply is interposed admitting them, since under section 522 of the Code of Civil Procedure, they are deemed controverted by the plaintiff by traverse or avoidance as the case requires.

APPEAL by the defendant, Grace Church of Millbrook, from an order of the Supreme Court, made at the Kings Special Term and entered in the office of the clerk of the county of Kings on the 5th day of April, 1921, denying defendant's motion for judgment on the pleadings dismissing the complaint.

*George Zabriskie*, for the appellant.

*Harold K. Hines*, for the respondent.

KELLY, J.:

The defendant moved for judgment upon the pleadings upon the claim that the complaint did not state a cause of action. The denials contained in the answer do not help the defendant, and there is no reply to the new matter in the separate defenses pleaded, which must, therefore, be deemed controverted by the plaintiff by traverse or avoidance as the case requires. (Code Civ. Proc. § 522.) While the complaint contains many averments which are not facts, making it subject to criticism, this is not such a motion under sections 545 and 546 of the Code of Civil Procedure.

We, however, find allegations that plaintiff is a qualified ordained minister in the Protestant Episcopal church; that on May 7, 1918, at a meeting of the vestry, a resolution was adopted by a majority vote, calling the plaintiff to be the rector of Grace Church; that plaintiff was notified by the clerk in writing of such action of the vestry, which it is alleged represented the people of the parish; that the plaintiff accepted the call in writing to the clerk; that the defendant agreed to pay plaintiff a salary of \$1,800 per year with the use of the rectory; that the pastoral relation arising from an election of a minister as rector is for life, unless otherwise specified; and that plaintiff's election and engagement as rector has never been dissolved in the manner provided by the canons of the church; that at the time of his election and of the agreement pleaded, the plaintiff had a canonical residence in the diocese of Central New York; that in accordance with the laws of the church he had obtained a certificate of transfer from the bishop of that diocese which



he duly presented to the bishop of New York, who agreed to accept the transfer and acknowledge the plaintiff as rector of Grace Church when he received the notice of plaintiff's election from the church wardens, which, it is stated, they were required to transmit to the bishop by the canons; that due demand has been made on the defendants but that they have neglected and refused to send the required notice; that by reason of this refusal the bishop is prevented from recognizing plaintiff as rector and that plaintiff is thus unable to enter upon performance of his duties, to his loss and damage. He alleges that he has been at all times ready, able and willing to perform his obligations under the contract which he alleges was made by defendants and accepted by him.

Section 42 of the Religious Corporations Law provides: "The vestry may, subject to the canons of the Protestant Episcopal Church in the United States, and of the diocese in which the parish or church is situated, by a majority vote, elect a rector to fill a vacancy occurring in the rectorship of the parish, and may fix the salary or compensation of the rector." The canons and customs of a religious denomination must be proved as matters of fact (*Youngs v. Ransom*, 31 Barb. 49), and no doubt will be material upon the trial. In the absence of a reply, such excerpts from the canons set out in the answer are not admitted as already pointed out. We express no opinion upon the merits of the action. We think the learned justice at Special Term rightly denied defendant's motion for judgment.

The order is, therefore, affirmed, with ten dollars costs and disbursements.

BLACKMAR, P. J., RICH, JAYCOX and MANNING, JJ., concur.

Order affirmed, with ten dollars costs and disbursements.

LUDOVIC PIGNATELLI, Respondent, v. THE PRESS PUBLISHING COMPANY, Appellant.

Second Department, June 17, 1921.

**Libel — pleading — improper to reallege in separate cause of action cause previously alleged — repetition of libel may be evidence of malice — allegations stricken out as redundant — proof of actual malice in each publication.**

In an action for libel in which the complaint sets forth three causes of action for three separate publications, it is improper to reallege in the second and third causes of action the causes of action previously alleged, and such allegations will be stricken out as redundant.

The repetition of a libel may be evidence of malice, but it is to be considered, if at all, in connection with the particular libel charged and repeated.

While the plaintiff may offer proof of actual malice in each publication under the allegations in his complaint, he cannot reallege and retry his separate causes of action in the manner proposed, for the practical result would be a double recovery.

APPEAL by the defendant, The Press Publishing Company, from an order of the Supreme Court, made at the Kings Special Term and entered in the office of the clerk of the county of Kings on the 26th day of March, 1921, denying defendant's motion to strike from the complaint certain allegations as redundant.

*Charles B. Brophy*, for the appellant.

*John Patterson* [*Herbert C. Brinckerhoff* with him on the brief], for the respondent.

KELLY, J.:

The action is to recover damages for alleged libel, and the complaint contains three separate causes of action for three separate publications. Having pleaded in the first cause of action an alleged libel on January 30, 1921, the plaintiff in his second cause of action alleges a different libel on January 31, 1921, and in his third cause of action a still different libel in a later edition of defendant's newspaper on January thirty-first. Each separate libel is charged to have damaged the plaintiff. But in pleading his second cause of action the

plaintiff repeats and incorporates therein the libel set out in the first cause of action and alleges that defendant "notwithstanding the injury done to the plaintiff by the false and malicious publication set forth in the first cause of action," published a libelous article on January thirty-first. And so in the third cause of action, the plaintiff repeats and incorporates therein the two separate libels already pleaded in the first and second causes of action, with a similar statement that notwithstanding the injury done to him by the previous wrongdoing, defendant published a third separate and distinct libel in a later edition of its newspaper on January 31, 1921.

The appellant complains that under this method of pleading it is exposed to the danger of a double recovery for the same wrong. The plaintiff insists that the matter objected to is inserted in the second and third causes of action to show the *animus* of the defendant and to enable the plaintiff to show actual malice and thus enhance his damages.

I think the defendant's objection to this form of pleading should be sustained. The repetition of a libel may be evidence of malice, but it is to be considered, if at all, in connection with the particular libel charged, and repeated. The plaintiff cannot in his second and third independent causes of action introduce the previous wrong which is the subject of another action. As part of each cause of action the plaintiff alleges that the publication was false and untrue and malicious. Each separate libel constitutes a separate cause of action. Mr. Justice MILLER, writing for this court in the First Department, said in *Collier v. Postum Cereal Co., Ltd.* (150 App. Div. 169, 177): "I think the fair rule, and the one to be adduced from the cases, is that evidence of publications which might be the subject of other actions should not be received for the sole purpose of enhancing damages. In cases in which the law implies malice the plaintiff does not need to prove actual malice as he will recover his compensatory damages without such proof, and, if he be allowed to give evidence of a publication which might be the subject of another suit, for the sole purpose of recovering punitive damages, the practical result will be a double recovery. However, if it be necessary to prove actual malice, *e. g.*, to rebut a claim of privilege, any evidence legitimately bearing on that question ought to be

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received even though it might be the subject of another action." While the plaintiff may offer proof of actual malice in each publication under the allegations in his complaint, he cannot reallege and retry his separate causes of action in the manner proposed. (*Fleischmann v. Bennett*, 87 N. Y. 231; *Burkan v. Musical Courier Co.*, 141 App. Div. 202.)

The order should be reversed, with ten dollars costs and disbursements,\* and defendant's motion granted, with ten dollars costs.

BLACKMAR, P. J., MILLS, RICH and MANNING, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and defendant's motion granted, with ten dollars costs.

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LOUIS GONZALES, Respondent, v. THE KENTUCKY DERBY COMPANY, Defendant, Impleaded with ISIDOR REICHENTHALER, Appellant.

Second Department, June 24, 1921.

**Contracts — contract not to sell or lease game or device to another — purchase by defendant of game operated by same mechanism with knowledge of lease to plaintiff — findings that games were same — acts of defendant done maliciously — defendant liable for inducing lessor to break contract with plaintiff — damages and not profits recoverable — injunction too broad.**

In an action to restrain the defendant from operating a game or device and to compel an accounting for the profits that he made by conducting the game it appeared that the plaintiff leased from a third person a game or device known as the "Kentucky Derby" which was operated by machinery; that the contract between the plaintiff and the lessor provided that the lessor would not sell or lease the same game to any other person to be operated on the Bowery at Coney Island, N. Y.; that thereafter the defendant with full knowledge of the contract between the plaintiff and the lessor of the game, purchased a device called "Over the Top" which was operated by the same mechanism as the game leased by the plaintiff; that the only difference between the two games was that the background of the one leased by the plaintiff represented a race course over which miniature horses were driven by machinery while the game purchased by the defendant showed a battle field and instead of horses there were soldiers.

*Held*, that a judgment in favor of the plaintiff can be supported only by a finding of fact that the game sold to the defendant is the "Kentucky Derby" game or device leased by the plaintiff.

Although no finding was made to that effect the fact did appear in a finding by the court, and the Appellate Division will add a finding of fact that the two games are the same.

The change in the background of the games and the substitution of figures of soldiers for the figures of horses does not change the identity of the game or device; in the appeal for public patronage they were the same game, and in the mechanism the same device.

The obligation to abstain from interference with a contract between others is a legal obligation, and neither active, as distinguished from constructive, fraud nor fraudulent misrepresentation is essential to the cause.

The act of the defendant was properly found to be malicious, for the defendant knew about the contract rights of the plaintiff, and the change from horses to soldiers was done with the intent of evading the provisions of the contract between the plaintiff and his lessor.

The action is one in tort and it was rightly referred to a referee to compute damages instead of profits.

Equity has jurisdiction to proceed by injunction to prevent the continuing breach of the contract in the future and, incidentally, to award damages for the past, but the judgment should enjoin the defendant in the use of the particular game only and should not extend to like or similar games, nor to the use thereof other than in the place specified in plaintiff's lease.

PUTNAM, J., dissents, with opinion.

APPEAL by the defendant, Isidor Reichenthaler, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 10th day of January, 1921, upon the decision of the court rendered after a trial at the Kings Special Term.

The Kentucky Derby Company, Inc., manufactured a game or device known as the "Kentucky Derby." It consisted of a mechanism by which miniature horses were driven along a miniature race course by the operation of machinery controlled by the patrons of the game. The background or scenery of the game, called the "flash," represented a race course. On or about the 18th day of April, 1918, the Kentucky Derby Company leased one of the games to the plaintiff for a term of fifteen years by a written contract containing the following clause, viz.: "III. The said Company agrees that it will not itself operate, or sell or lease to any other person, firm or corporation any other Kentucky Derby game or device,

to be operated on the thoroughfare known as the Bowery, Coney Island, N. Y., during the season of 1918, or as long thereafter as the said Gonzales wishes to have the exclusive right to operate the same game or device on said thoroughfare, as hereinafter provided." In April, 1919, while the plaintiff had the so-called "exclusive right," the Kentucky Derby Company sold to defendant Reichenthaler an amusement device called "Over the Top," and Reichenthaler installed it on the Bowery, Coney Island, near the "Kentucky Derby" game operated by plaintiff. The game "Over the Top" was operated in the same way and by the same machinery as the "Kentucky Derby" game, but differed from it in that the "flash" or background of "Over the Top" showed a battlefield instead of a race course, and that instead of horses there were soldiers. Reichenthaler was fully informed of the terms of the contract between the Kentucky Derby Company, Inc., and plaintiff, and obtained the game "Over the Top" and installed it near the plaintiff for the purpose of securing patronage which would otherwise have fallen to plaintiff.

The plaintiff, claiming that the game "Over the Top" was the "Kentucky Derby" game, brought this action against Reichenthaler and the Kentucky Derby Company, praying that Reichenthaler be restrained from operating the game "Over the Top" and that he be directed to account to the plaintiff for the profits that he made by conducting the game. The action was discontinued against the Kentucky Derby Company, Inc., and upon trial judgment was granted to plaintiff enjoining Reichenthaler from the use of the game "Over the Top" and referring the case to a referee to compute the damages sustained by the plaintiff. From that judgment Reichenthaler appeals.

*Jerome A. Strauss* [*Samuel Abrahams* with him on the brief], for the appellant.

*Charles E. McMahon* [*George B. Hayes* with him on the brief], for the respondent.

BLACKMAR, P. J.:

The primary controverted question of fact is whether the game "Over the Top" is the same as the "Kentucky Derby"

game. There are several findings that the games are alike or "similar" or "corresponding;" but such findings are irrelevant. The judgment can be supported only by a finding of fact that the game called "Over the Top," sold to defendant Reichenthaler, is the "Kentucky Derby" game or device. However, we think that the required fact appears in finding 21, and to this we add a finding of fact that the game "Over the Top" is the "Kentucky Derby" game or device. The change in the "flash" and the substitution of figures of soldiers for figures of horses do not change the identity of the game or device. In the appeal for public patronage they are the same game, and in mechanism the same device.

The serious question of law is upon the liability of defendant Reichenthaler to damages for inducing the Kentucky Derby Company, Inc., to break its contract with plaintiff. The question seems to be answered in the negative in *New York Phonograph Co. v. Davega* (127 App. Div. 222). To the same effect seem to be *Ashley v. Dixon* (48 N. Y. 430), *Daly v. Cornwell* (34 App. Div. 27) and *Laskey Feature Play Co., Inc., v. Fox V. Co.* (93 Misc. Rep. 364). These cases hold that a third party who induces one to break a contract is not liable to the other party unless it is done by fraud or fraudulent representations.

Later cases, however, have apparently modified this doctrine, so that, as the law is in its present condition of development, the moral obligation to abstain from interference with a contract between others, referred to by Judge EARL in *Ashley v. Dixon* (*supra*) is now a legal obligation, and neither active, as distinguished from constructive, fraud nor fraudulent misrepresentation, is any longer essential to the cause of action.

In *Standard Fashion Co. v. Siegel-Cooper Co.* (30 App. Div. 564) the point is slightly touched upon with the assertion of the liability of a third party for inducing the breach of a contract, but not in a reasoned opinion. The case arose on demurrer and was affirmed in 157 New York, 60. *Murphy v. Christian Press Assn. Pub. Co.* (38 App. Div. 426), sometimes cited on this point, involves a trespass on property (*i. e.*, a copyright), and, therefore, I do not consider it an authority. However, a direct authority seems to be found in *New York*

*Bank Note Co. v. Hamilton B. N. Co.* (83 Hun, 593). The case was subsequently considered in 180 New York, 280, and the opinion, written by CULLEN, Ch. J., approves the proposition that the defendant was liable for inducing the breach of contract, and that without evidence of fraud or false representations. *Posner Co. v. Jackson* (223 N. Y. 325) was the case of a third party inducing an employee to break his contract with an employer, and the rule of law is stated as follows: "If a person knowingly and intentionally interfere with the express contract rights of an employer with his employee and the purpose and intent of such interference is to injure such employer and it does result in his injury, an action will be sustained to recover damages therefor." The case upheld the sufficiency of a complaint which alleged that the defendants and others to plaintiff unknown "conspired to and did wrongfully entice said Sarah C. Posner from the employ of the plaintiff and persuaded and induced her to wrongfully break her contract" with the plaintiff.

In *Lamb v. Cheney & Son* (227 N. Y. 418), which went up on demurrer to the sufficiency of the complaint alleging that the defendant "maliciously" induced an employee to break his contract with plaintiff, the court upheld the complaint, saying: "In actions of this character the word should be given a liberal meaning. The act is malicious when the thing done is with the knowledge of plaintiff's rights and with the intent to interfere therewith. In a legal sense it means a wrongful act, done intentionally, without just cause or excuse. \* \* \* It does not mean actual malice or ill-will, but consists in the intentional doing of a wrongful act without legal justification."

The finding of fact in the case before us is that the defendant, "in wilful violation of the terms and conditions of the said agreement, and wilfully intending to violate same, and wilfully and maliciously intending to interfere with and injure the rights of the plaintiff under said agreement and renewal thereof, negotiated with the Kentucky Derby Co., Inc." Under the authority of *Lamb v. Cheney & Son* (*supra*), the act of the defendant in this case was properly found to be malicious, for the defendant knew about the contract rights of the plaintiff, and the change from horses to soldiers was done with



the intent of evading the provisions of the contract between the Kentucky Derby Company and the plaintiff.

It will be noted that the two cases last cited involved contracts of employment. I am unable to imagine any sufficient reason why the same rule does not apply to contracts of a different nature. Such was the decision in *New York Bank Note Co. v. Hamilton B. N. Co.* (*supra*), and such is the opinion of Mr. Justice SCOTT in the First Department in *De Jong v. Behrman Co.* (148 App. Div. 37).

The action is in tort for maliciously inducing the Kentucky Derby Company, Inc., to break its contract with the plaintiff. The judgment rightly referred it to a referee to compute damages instead of profits. Profits could be recovered only if defendant Reichenthaler was using plaintiff's property. Such is the basis of awarding profits for the infringement of a patent, over which subject State courts have no jurisdiction. (*Continental Store Service Co. v. Clark*, 100 N. Y. 365; *Lamb v. Cheney & Son*, *supra*.) In the "Kentucky Derby" game the plaintiff has no property rights used by the defendant, which this court can consider. The plaintiff's right is simply in the contract with the Kentucky Derby Company and his sole cause of action is in tort for damages for inducing a breach of such contract. As an action at law would not afford an adequate remedy, because the breach is a continuing one, equity has jurisdiction to proceed by injunction to prevent the continuing breach in the future and, incidentally, to award damages for the past.

The judgment is too broad. It should enjoin defendant Reichenthaler only and should not extend to like or similar games nor to the use thereof other than on the Bowery, Coney Island.

The 10th finding of fact must be disapproved, and in place thereof this court makes a finding in the words of the provision of the contract in question.

The judgment and findings should be modified in accordance with this opinion, and the judgment as modified affirmed, without costs.

MILLS, RICH and JAYCOX, JJ., concur; PUTNAM, J., reads for reversal.

PUTNAM, J. (dissenting):

Interference with contract rights first became actionable when the relations of master and servant were involved. Long before *Lumley v. Gye* (2 E. & B. 216) New York courts recognized a remedy for harboring servants against one knowing of their relation. (*Scidmore v. Smith*, 13 Johns. 322 [1816].) If only such means or inducements as a better offer are used, with no fraud or misrepresentation, one may induce another to break off an existing contract. (*Ashley v. Dixon*, 48 N. Y. 430; *Roseneau v. Empire Circuit Co.*, 131 App. Div. 429, 434.)

*Posner Co. v. Jackson* (223 N. Y. 325) and *Lamb v. Cheney & Son* (227 id. 418), relied on in the prevailing opinion, are based on remedies of employers. They come far short of extending such rights to sue to general contracts, such as sales with exclusive covenants.

*New York Bank Note Co. v. Hamilton B. N. Co.* (180 N. Y. 280) was a peculiar case. The fraud in that suit was not a mere attribute of a breach of contract. The fraudulent scheme was engineered by a former secretary of the plaintiff, who carried confidential information to the Hamilton Company, and by his negotiations the press was obtained, so that an injunction was there based on substantial grounds.

Furthermore, in the case at bar there was not the identical device, but one wherein the background and scenery of the two games are "entirely dissimilar," as the court has found. If the law here is to follow the Massachusetts decision that there is no difference between enticing a servant, and inducing the breach of any other contract (*Beekman v. Marsters*, 195 Mass. 205), this judgment can be affirmed; but I am not prepared to go to that length.

Interlocutory judgment and findings modified in accordance with opinion by BLACKMAR, P. J., and the judgment as modified affirmed, without costs. Settle order on notice before the presiding justice.

MARY L. SCHERMERHORN, Appellant, v. JOHN R. SCHERMERHORN, Respondent.

Third Department, May 4, 1921.

**Husband and wife — separation — temporary alimony and counsel fees — Nevada decree in divorce action dismissing complaint in action by defendant herein not bar to separation here or allowance of alimony and counsel fees.**

The decree of a Nevada court in a divorce action by the husband on the ground of cruelty in which the wife appeared and answered but did not interpose a counterclaim for divorce or separation, dismissing the complaint and answer, is valid and binding on the parties to the extent of the matters decided therein and has the same force between the parties as though procured in this State.

That decree does not bar the wife from bringing an action in this State for separation nor from securing temporary alimony and counsel fees, should the Special Term consider her entitled thereto.

APPEAL by the plaintiff, Mary L. Schermerhorn, from an order of the Supreme Court, made at the Saratoga Special Term and entered in the office of the clerk of the county of Schenectady on the 26th day of June, 1920, as resettled by an order, made at the Schenectady Special Term, and entered in said clerk's office on the 15th day of January, 1921, denying plaintiff's motion for alimony and counsel fees.

*Naylon, Robinson & Maynard* [Daniel Naylon, Jr., of counsel], for the appellant.

*Borst & Smith* [Homer J. Borst of counsel], for the respondent.

VAN KIRK, J.:

The motion was denied solely on the ground that "the judgment of the Nevada court is, as it now stands, a bar to this motion." The merits of the motion, or whether a cause of action was stated in the complaint, were not considered. This action is for a separation, brought by the wife, who was the defendant in the Nevada action, against the plaintiff therein.

The action in Nevada was brought for a divorce based on charges of cruelty; the defendant appeared and answered in that action. In her answer she set forth no counterclaim for divorce or separation and she made no demand for such

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relief. She did ask that relief be denied to the plaintiff; also that \$150 per month alimony be granted her. This demand for alimony was not based upon any affirmative relief to be granted to her, but evidently in case the husband was granted a decree. The Nevada decree dismissed both the complaint and the answer. That decree is valid and binding upon the parties and has the same force between the parties as if procured in this State, but it does not decide matters not involved in that action.

The plaintiff here is not barred by the Nevada decree from bringing an action for separation in this State, nor is she barred thereby from securing alimony in such an action, should the Special Term consider her entitled thereto. We have read the cases cited by the court below and find nothing in conflict with the above.

The order is reversed, with ten dollars costs and disbursements, and plaintiff allowed alimony in the sum of forty-two dollars a week, from the time motion was made, and for counsel fee and expenses five hundred dollars, with ten dollars costs.

All concur.

Order reversed, with ten dollars costs and disbursements, and plaintiff allowed alimony in the sum of forty-two dollars a week, from the time motion was made, and for counsel fee and expenses five hundred dollars, with ten dollars costs.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
GEORGE BALDWIN and JENNIE BALDWIN, Appellants.

Third Department, May 4, 1921.

**Public lands — adverse possession against State — distinction between lands held by State as sovereign and as proprietor — Statute of Limitations does not apply where lands held as sovereign — adverse possession not completed before creation of Forest Preserve not bar to State — failure of Forest Commission to assert title.**

In the absence of statute authorizing it, lands of a sovereign State cannot be lost to or taken from the State by failure to assert her title, and, after the passage of a statute of limitations, such land only as the State holds

as a proprietor may be lost by adverse possession of an individual; it cannot lose such lands as it holds for the public, in trust for a public purpose.

The lands of the Forest Preserve created by chapter 283 of the Laws of 1885 and section 7 of article 7 of the Constitution, which became operative January 1, 1895, are held by the State in her sovereign capacity in trust for a public purpose and cannot be acquired by adverse possession.

The claim of the defendants that they have title to the lands in question, which are a part of the Forest Preserve, by adverse possession based on a deed to them in 1865, cannot prevail, since the State acquired title thereto by tax deed in 1851, and in 1885, when the Forest Preserve was created, the defendants had not acquired title by adverse possession.

The fact that the Forest Commission failed to assert title to the lands in question as it was authorized to do by chapter 283 of the Laws of 1885 does not prejudice the rights of the State, nor is it estopped from asserting its rights by the unauthorized acts or omissions of the Forest Commission. JOHN M. KELLOGG, P. J., dissents, with memorandum.

APPEAL by the defendants, George Baldwin and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Hamilton on the 24th day of January, 1920, upon the decision of the court rendered after a trial without a jury at the Fulton county Trial Term.

*Eugene D. Scribner*, for the appellants.

*Charles D. Newton*, Attorney-General [*William T. Moore*, Deputy Attorney-General, of counsel], for the respondent.

VAN KIRK, J.:

The State acquired title to the lands in question, situated in Hamilton county, under a tax sale and a deed following, dated February 18, 1851. The acquired title of the State is not questioned, but the defendants claim they have gained title by adverse possession under deeds, the first of which is dated July 15, 1865. The lands had been occupied, cultivated and used, as was usual and customary in that section, since 1857 or 1858 by the defendants and their predecessors. During all the time these lands were assessed and taxes paid to the State by those in possession. These taxes cannot be looked upon as rents or profits of the real property.

The opinion of Mr. Justice WHITMYER gives a complete and very accurate statement of the facts of the case and the

statutes applicable and well expresses the conclusion he has reached. (113 Misc. Rep. 172.)

The trial court has adopted the construction put upon the California statute in *Weber v. Harbor Commissioners* (18 Wall. 57) as the true construction of our statute (*infra*).

The appellants contest this construction.

The California statute, so far as material, reads as follows: "The People of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the People to the same, unless —

"1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced." The remainder of the section as to rents and profits is identical with the corresponding New York statute, except as to number of years. (Cal. Code Civ. Proc. § 315; N. Y. Code Proc. § 75.)

The California statute is identical with our statute, as it formerly existed (except the number of years), but the New York statute has been changed and now reads (Code Civ. Proc. § 362):

"When the People will not sue. The People of the State will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the People to the same, unless either:

"1. The cause of action accrued within forty years before the action is commenced; or,

"2. \* \* \*

We have observed the difference in expression in the two statutes; also that, in the *Weber* case, the words in the California statute, unless such right or title "shall have accrued," are construed to mean "shall have existed;" and that the expression in that opinion, "no assertion of her [the State's] title or interest is made," is used as equivalent to the words of the statute, "unless \* \* \* any action or other proceeding for the same is commenced;" also the presumption of a grant arising under the permission given in the statute is held to be rebutted by the assertion of title in the legislative act referred to; and further that, if our statute (Code Civ. Proc. § 362, *supra*) is strictly construed, the cause of action by the State did not accrue within forty

years before the action was begun, since it accrued in 1857 or 1858 and the action was not begun till March, 1918, and, therefore, by its agreement in the statute the State would not sue. (*Fulton Light, H. & P. Co. v. State of New York*, 200 N. Y. 400, 420; *People v. Arnold*, 4 id. 508.)

We are of the opinion that the vital question in this case is this: Was the land, the title of which is in question here, owned and held by the State as a sovereign in trust for the People, or as a proprietor only?

There is a well-recognized distinction between lands held by the State as sovereign in trust for the public and lands held as proprietor only, for the purpose of "sale or other disposition." (*Weber v. Harbor Commissioners*, *supra*, 68.) In either circumstance, unless a statute (making an agreement on behalf of the People not to sue) authorizes it, lands of a sovereign State cannot be lost to, or taken from, the State by failure to assert her title (2 C. J. 213; *Fulton Light, H. & P. Co. v. State of New York*, 200 N. Y. 400, 420; *St. Vincent Orphan Asylum v. City of Troy*, 76 id. 108; *Hays v. United States*, 175 U. S. 248, 260); and, after such a statute has been passed by a State, such lands only as the State holds as a proprietor may be lost to the State; it cannot lose such lands as it holds for the public, in trust for a public purpose, as highways, public streams, canals, public fair grounds. (*Burbank v. Fay*, 65 N. Y. 57; 2 C. J. 213, 214, 215.)

The lands in question here were held for a public use before the time within which title by adverse possession could be acquired, and these defendants have not acquired title thereto.

We should have in mind that the lands in question are not within any incorporated village or city and are not lands which have been "acquired by the State of New York, upon or by foreclosure of or sale pursuant to any mortgage upon lands made to the commissioners for loaning certain moneys of the United States, usually called the United States deposit fund, and all such excepted lands acquired by the State of New York may be sold and conveyed as provided by law" (Laws of 1890, chap. 8, amdg. Laws of 1885, chap. 283, § 7), but all such lands not excepted may not be sold or conveyed in any manner. By the Laws of 1885, chapter 283, the Forest Preserve was created. This statute declared (§ 7): "All the

lands now owned or which may hereafter be acquired by the State of New York, within the counties of \* \* \* Hamilton, \* \* \* shall constitute and be known as the Forest Preserve." (See, also, Id. § 7, as amd. by Laws of 1887, chap. 639; Laws of 1888, chap. 520; Laws of 1889, chap. 24, and Laws of 1890, chap. 8.) Section 8 of the act of 1885 provided: "The lands now or hereafter constituting the Forest Preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." (See, also, Laws of 1887, chap. 475, amd. said § 8.) In 1893 (Laws of 1893, chap. 332) and in 1895 (Laws of 1895, chap. 395) the act of 1885 was repealed, but the repealing acts contained identical provisions with those of the act of 1885, and so these statutory provisions have continued until to-day. (*People ex rel. Forest Commission v. Campbell*, 152 N. Y. 51. See Forest, Fish and Game Law [Gen. Laws, chap. 31; Laws of 1900, chap. 20], § 216 *et seq.*, as amd.; Forest, Fish and Game Law [Consol. Laws, chap. 19; Laws of 1909, chap. 24], § 34 *et seq.*, as amd.; Conservation Law [Consol. Laws, chap. 65; Laws of 1911, chap. 647], § 50 *et seq.*, added by Laws of 1912, chap. 444, as amd.; Conservation Law, § 50 *et seq.*, added by Laws of 1916, chap. 451, as amd.; Id. § 62, added by Laws of 1916, chap. 451, as amd. by Laws of 1917, chap. 266.) Article 7, section 7, of the Constitution became operative January 1, 1895, and provides: "The lands of the State, now owned or hereafter acquired, constituting the Forest Preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed." These provisions have been continued by the amendments since made in 1913 and 1918 to that section of the Constitution. (See Laws of 1914, p. 2373; Laws of 1919, p. 1783.) On December 13, 1894, the Comptroller's notice, as to ownership and possession, authorized by the statute (Laws of 1893, chap. 711, § 13; revised by Tax Law [Gen. Laws, chap. 24; Laws of 1896, chap. 908], § 133; now Tax Law [Consol. Laws, chap. 60; Laws of 1909, chap. 62], § 133) was duly published, declaring that these lands in

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question were of the "wild, vacant and forest lands \* \* \* to which the State holds title, and that from and after three weeks from the 13th day of December, 1894, possession thereof shall be deemed to be in the Comptroller of this State." (For the purpose and effect of this act, see *Saranac L. & T. Co. v. Roberts*, 195 N. Y. 303, 321; *People ex rel. Turner v. Kelsey*, 180 id. 24, 26.) "The Forest Commission, as the representative of the State, has the actual possession of the lands embraced in the Forest Preserve." (*People ex rel. Turner v. Kelsey, supra.*) Thus the State, by public statute and by published notice, of which all the inhabitants of the State were bound to take notice, openly claimed title to this property and declared the public use to which it was dedicated. Since 1885 the State has held, and been in possession of, this land as part of its Forest Preserve, kept as a public park in trust for the people, to promote the general health and welfare and to conserve the streams. (*People ex rel. Turner v. Kelsey, supra; People ex rel. Forest Commission v. Campbell, supra.*) In the opinion in the *Kelsey* case this language was used: "We have referred to the provisions of the Constitution for the purpose of showing that these lands are forever reserved for the Forest Preserve and that no power exists on the part of the Legislature or of any officer or department of the State to dispose of, or in any manner deprive the People of their title to the lands. Not only are these lands brought within the protecting power of the Constitution, but that of the Legislature as well. Various statutes have been enacted, by which the police power is extended over this territory. It is made a public park, placed under the care, control and supervision of a commission and watched and guarded by wardens, foresters and game protectors who actually reside upon the preserve and who may arrest violators of the statute in cases specified, without warrant." There was by statute and Constitution a complete dedication of the lands owned by the State in Hamilton county to a public use to endure "forever." We can conceive no reason why the State had not the power to so dedicate these lands it then owned as against any and all persons. When the act of 1885 was passed, and article 7, section 7, of the Constitution was adopted, these lands in Hamilton county were "owned" by the State. No title adverse to the State

had been acquired by any person. In the act of 1885 (§ 11) the Forest Commission was authorized (which in this case was a command, *Medbury v. Swan*, 46 N. Y. 200, 202; *Phelps v. Hawley*, 52 id. 23, 27) to bring, in the name of the People of the State of New York, any action to prevent trespass on lands, and to recover lands, properly forming part of the Forest Preserve, but occupied or held by persons not entitled thereto, and in all other respects for the protection and maintenance of the Forest Preserve, which any owner of lands would be entitled to bring. Had an action been then brought against these defendants, or their predecessors in occupation, no question as to the State's title could have been successfully raised. Such action was not brought as to these lands, but the State is not prejudiced in its rights by the failure of its appointed agents or officers to obey its commands, nor by their unauthorized acts or omissions is the State estopped from asserting its rights. (*Wells v. Johnston*, 171 N. Y. 324, 328; *People v. Santa Clara Lumber Co.*, 213 id. 61.) These lands then, so held, could not be acquired by any person by adverse possession. (*Burbank v. Fay*, *supra*; *Waterloo W. M. Co. v. Shanahan*, 128 N. Y. 345; *Weber v. Harbor Commissioners*, *supra*, 70.)

Neither the Statute of Limitations, nor title by adverse possession, is pleaded in the answer, but no question as to the sufficiency of the answer is raised and the evidence tending to show an adverse possession was admitted without objection.

The judgment should be affirmed, with costs to the respondent.

All concur, except JOHN M. KELLOGG, P. J., dissenting with a memorandum.

JOHN M. KELLOGG, P. J. (dissenting):

Upon the trial no question was raised as to the pleadings, and all the facts with reference to the plaintiff's title, and the defendants' title and possession, and the respective rights of the parties, were fully litigated without question or objection, and the pleadings may be considered as amended to conform to the proofs.

The State obtained a tax deed in 1851, which was not recorded until 1911. No notice of this deed, or of any claim by plaintiff, was given to the defendants or any of their predecessors in title, and the premises were bought, sold and resold, possessed, improved and used by them, with the understanding that there was no question about the title. The Comptroller included these lands in a notice published in December, 1894, pursuant to section 13 of chapter 711 of the Laws of 1893 (now section 133 of the Tax Law), in a list of the wild, vacant and forest lands held by the State. However, these lands were not of that character, but were cultivated, improved and assessed to and in the actual possession of the defendants and their grantors. The publication, therefore, has no effect as to them.

The defendants base their claim of title upon a deed given by John Bass to Albert Hanner, in July, 1865, and four later deeds, all of which deeds were duly and promptly recorded and before the recording of the plaintiff's deed. At the time of the conveyance by John Bass to Hanner, in July, 1865, the premises were in the actual, undisturbed possession of the grantor, who was living in a log house upon the said premises. There were then there fifteen acres of meadow and a log barn, and the land was fenced, cultivated and improved and used substantially in the manner in which farms in that locality were used. Hanner, at the time of the trial, was eighty-two years of age. He conveyed the land three years after he received the deed, but swears that he was in possession for nine or ten years before he sold them. It is a fair inference, therefore, that he was in possession from six to seven years upon contract of purchase before he received his deed, which would date his possession from about 1858. The State collected taxes from the defendants and their predecessors in title. Exact proof, from the nature of things, cannot be made as to the facts at so remote a time and, necessarily, liberal inferences must be drawn, from the scanty evidence, in favor of defendants, who have succeeded to the rights of Bass and whose possession has been undisturbed and unquestioned during all the intervening years.

The Statute of Limitations is one of repose, based upon the theory that the mists of time prevent the actual facts

from appearing, and it is improbable that any one now living can state the facts as to the time when Bass entered into possession. They can be judged of from the condition of the farm in 1857, at the time the first witness describes it as occupied by Bass. The description of the premises at that time makes it certain that the clearing, the cultivation and the improvement of the property must have begun several years before 1857, and inferences may be liberally resorted to to prevent an apparent injustice where the State has been so remiss in asserting its rights and the defendants and their predecessors have been paying the plaintiff taxes and improving the property.

Manifestly Hanner and his successors in title, including the defendants, were purchasers in good faith and for a valuable consideration, and the plaintiff's prior unrecorded deed establishes no title as against them. As we have seen, it affirmatively appears that none of them had any notice of the plaintiff's claim, and each claimed to be and understood that he was the absolute owner of the property. Section 241 of the former Real Property Law (Gen. Laws, chap. 46; Laws of 1896, chap. 547) first brought into the Recording Act (now Real Property Law, § 291) the provision making an unrecorded conveyance void as against subsequent purchasers with recorded deeds "from the same vendor, his heirs or devisees." There is a question whether the Legislature, which brought the quoted words into the statute, did not at the same session take them out by amending the Revised Statutes upon that subject. (1 R. S. 756, § 1, as amd. by Laws of 1896, chap. 572; *Assets Realization Co. v. Clark*, 205 N. Y. 105, 119.) That question, however, is quite immaterial, as the recording of Hanner's deed gave him and his successors title to the property which the plaintiff could not question.

We must, therefore, conclude that at the time the Forest Preserve Act was passed the State had no title to the property which it could enforce against Hanner's successors in title. If, however, it is considered that the State did have title at the time the Forest Preserve Act was passed in 1885, it held the title as a proprietor and not as a sovereign. The premises were held for sale, or other disposition, and were charged with no public trust. When we consider that

the State never used the property, or claimed it, but that it was held adversely by others, it cannot be said that the passage of the Forest Preserve Act made this a public property so as to change the nature of the State's holding from that of a proprietor into that of a sovereign. We cannot quarrel with the rule that a Statute of Limitations, in general terms, does not bar the State. The State, unless mentioned in the act, is presumed to be excepted from its burden. (17 R. C. L. 689, § 37; *People v. Gilbert*, 18 Johns. 227, 229; *People v. Herkimer*, 4 Cow. 345.) The Code of Civil Procedure (§ 362) provides that "The People of the State" will not sue a person for or in relation to real estate after forty years from the time of the accruing of the claim, or unless it has received the rents and profits within that time. There is no place for presumption, as the section is an express limitation upon the People of the State. (See *Fulton Light, H. & P. Co. v. State of New York*, 200 N. Y. 400, 421, 422.) The statute is one of repose, to prevent overzealous public officials from harassing a person occupying land for forty years or more by the prosecution of stale claims. The limitation does not rest upon a presumption of a grant; it simply prevents the use of the court for the prosecution of such a claim. It does not purport to affect the title to property; it only makes the occupant immune from action by the State. The presumption of a grant arising from lapse of time does not assume that the grant was made at any particular time, but at some time during the occupancy. It is more natural to assume that it took place at about the time of the inception of the occupancy than at a later date. I favor reversal.

Judgment affirmed, with costs to the respondent.

RURAL PUBLISHING COMPANY, INC., Appellant, v. ADOLPH S.  
KATZMAN, Respondent.

First Department, May 27, 1921.

**Landlord and tenant — summary proceedings for removal for non-payment of rent — lease construed not to include lot in rear of dwelling — entry constituting actual partial eviction not shown — constructive eviction no defense.**

In summary proceedings for the removal of a tenant on the ground of non-payment of rent, lease examined and construed not to include the yard in the rear of the dwelling rented to the defendant or to preclude the plaintiff from erecting a building thereon.

No entry by the plaintiff constituting an actual partial eviction which would entitle defendant to remain in possession of the remainder of the premises without paying any rent was shown, and his defense to the proceedings based thereon was not sustained.

If there were a constructive eviction, which in this case could be predicated only on the increase in the noise and vibrations and interference with light and air as to all or part only of the premises, without an actual abandonment by the defendant, that would not be a defense to an action for rent.

APPEAL by the plaintiff, Rural Publishing Company, Inc., from an order and determination of the Appellate Term of the Supreme Court, First Department, entered in the office of the clerk of the county of New York on the 10th day of December, 1920, affirming a final order in summary proceedings rendered in the Municipal Court of the City of New York, Borough of Manhattan, Third District, in favor of the defendant.

*John Godfrey Saxe* [*M. Edward Kelley* with him on the brief; *Kelley & Connelly*, attorneys], for the appellant.

*Simon T. Stern*, for the respondent.

LAUGHLIN, J.:

This is a summary proceeding for the removal of a tenant on the ground of non-payment of rent. The allegations of the petition with respect to the making of the lease, the original entry and the possession by the tenant, and non-

payment of the rent were not denied by the answer, but the tenant denied that he still occupied the premises and alleged that he then only remained in possession of a portion of the premises, and denied that rent was due or owing or that he had made default in the payment of rent or continued in possession after such default; and for a separate defense the tenant reiterated the denials and pleaded the lease and alleged that before any rent became due or payable, the landlord wrongfully entered upon the premises and removed him from the rear portion on the northerly side thereof, "being a strip of ground 50 feet in length and 20 feet 6 inches wide, extending across the lot, and kept the said tenant out of possession continuously thereafter and still continues to keep said tenant out of the possession of said portion of said premises," and that without his consent the landlord removed a fence surrounding said portion of the premises and erected a building and that the portion of the premises so taken and built upon by the landlord constituted the greater portion of the rear yard of the demised premises and belonged thereto, and that at the time of said entry and removal of the fence and erection of the building by the landlord no rent was due, and that by reason of the premises no rent thereafter became due. The lease was made on the 25th of January, 1919, and thereby the landlord leased to the tenant for a term of five years, commencing on the 1st of March, 1919, at the annual rental of \$1,200, payable in advance in monthly installments of \$100 each, the premises described as follows: "all that certain dwelling known and designated as number Three Hundred and Twenty Seven (327) West Thirtieth (30th) Street, in the City of New York, Borough of Manhattan." The description is in no manner enlarged by any other provision of the lease. Throughout the lease, the premises are referred to as "the premises," "said premises," and "the demised premises;" and there are also references to "the building hereby leased" and to "the building."

The uncontroverted evidence shows that this house was built on the northerly line of West Thirtieth street on the southeasterly corner of a lot and that on the southwesterly corner of the lot a church was erected, leaving a private alleyway, five or six feet wide, running back from the street between

the church and the house of the depth of the house and connecting with the yard in the rear of the house and of the church. The house was built to the easterly line of the lot and was twenty-two or twenty-three feet wide. Many years prior to the time the lease was made the landlord owned the entire premises and altered the church into a printing house and used it for that purpose and used the alleyway, which was kept closed by a locked gate at the street line, for taking in and out material, and used the yard in the rear of the dwelling and printing house for storage purposes in connection with its printing business. A fence extended around the easterly, northerly and westerly lines of the lot from the northeasterly corner of a shed built against the rear of the house to the northwesterly corner of the printing house. That fence and the buildings and the alley gate inclosed all of the premises not covered by the buildings. The employees of the landlord some years before had made a table for playing a game described by the witness as the Italian game of "boche," consisting of a deep bed of cinders extending eight or nine feet in width from the end of the alley at the northerly line of the house and from part of the northwesterly end of the house to the northerly line of the lot and had used the same for many years in playing the game by rolling wooden balls thereon from the northerly end of the alley and house to the northerly fence. The bed of cinders was supported on the easterly line by planks which the tenant claims constituted a fence inclosing the rear yard, to which there was access from the house through the shed; and he testified that this fence extended from the northwesterly corner of the house at some points two and at others three feet above the surface of the yard in the rear of the house; but the preponderance of the evidence is to the effect that it was not a fence and that its height was only sufficient to sustain the bed of cinders and that it afforded no obstacle to access from the alley to the yard in the rear of the house and that said yard was used by the landlord as its business required. There were three doors on the easterly side of the printing house, one opening onto the alley and the others toward the yard in the rear of the house and they were used to a considerable extent in connection with the landlord's business. There was also a



fire escape built on the easterly side of the printing house with a platform or bridge extending out for some distance and a stairway leading down into the yard in the rear of the house some seven or eight feet from the easterly side of the printing house. The evidence tends to show that to some extent the fire escape interfered with the playing of the game of boche by the employees and that they discontinued playing the game there before the defendant took possession. In the month of December before the lease was made the landlord had caused to be prepared by an architect and filed with the building department plans for the erection of a building in the yard in the rear of the dwelling house for storing rolls of paper and it erected the building according to the plans without alteration in the month of October after the tenant took possession of the house under the lease. The lease contains no reference to any *appurtenance*. Respondent claims, however, that it gave him the use of the yard in the rear of the house. He testified that he was looking for a house and saw a sign on this house and entered the printing house, where he met one McGuire, who showed him through the dwelling and the yard, which extended back from the house some fifty-five or fifty-eight feet, and two trees in the yard and where wash lines could be hung; that the house was twenty-two feet by forty-two feet in depth and access to the yard was had through the shed; that the yard was paved with stone flagging and that there was nothing in the yard with the exception of a pile of rubbish and it was inclosed by an easterly and a northerly fence and by a fence two or three feet in height on the west, the support of the bed of cinders to which reference has been made, and that there was no entrance to the yard excepting through the house; that he was a physician and had his office on the first floor and that before the building was erected in the rear he used the yard for hanging out wash on lines extending from the house to a fence in the rear and that after the erection of the building in the rear he was obliged to extend the wash line from the second story to the top of the new building and that the new building to a considerable extent shut off the northerly light which he required in using his instruments and particularly the microscope. McGuire, who showed respondent the

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house and yard, was employed as a porter and it was not shown that he had any authority to represent the landlord with respect to the negotiations for the lease. The landlord, in making the lease, was represented by Mr. Dillon, its president. The tenant testified that his negotiations were with Dillon who informed him that they had thought of putting up a storage building in the rear of the yard but said nothing about building there in the future and that he was permitted thus to use the yard for hanging out wash until the middle of October and paid the rent due down to that time; that about the fifteenth of October some men appeared in the yard and began to tear down the fences and to dig, but upon his protest they desisted and then returned a day or two later and proceeded with the work, and that during the construction of the building he protested to Dillon that it was cutting off his light and air and rendering it impossible for him to use his instruments, but that the landlord proceeded and finished the construction, cutting off all of the rear yard excepting about ten by twelve feet thereof which was insufficient to hang out wash, and that the new building is twenty-five by forty-five feet and about sixteen feet high and reaches about half way above the level of the first parlor floor window of the dwelling and is twelve feet distant therefrom and was connected with the north wall of the house, and thereby noises and vibrations are increased and that the landlord has erected between its printing house and the new building an iron or steel runway on which rolls of paper are carried from the street to the new building, causing a continuous vibration and rumbling. The tenant testified that he had three interviews with Dillon and that his wife, who was not called as a witness, was present at one; that without any suggestion from Dillon he offered to allow the landlord to store paper in the basement of the house and when Dillon said they thought of erecting a storage building in the rear of the yard, he stated that if they ever needed storage space they could use the cellar of the house and that there was nothing stated to the effect that the lease described the house only because the landlord desired to use the yard. Dillon testified that at the first interview he informed the tenant that plans for the erection of the storage building in the rear had been filed

and that the tenant said that he did not care about the yard but wanted the house heated from the printing shop and that the installation of radiators essential for that purpose was made by the landlord at a cost of \$700 and heat was so furnished; that he informed the tenant the reason he was letting the house so cheap was on account of the building to be erected in the yard in the rear and that at the second interview, when the tenant's wife was present, he asked if she had been informed that a building was to be erected in the rear and the tenant answered in the affirmative; that he also informed the tenant that the building would have been commenced before that time were it not for delay in getting the permit and that he informed the tenant with respect to the dimensions of the new building, and that the only complaint the tenant made when the building was being constructed was that it was larger and closer to the house than he had been informed; that when the lease was signed he drew the tenant's attention to the fact that it only covered the dwelling and that the tenant agreed that that was his understanding. With respect to the material part of these interviews, Dillon was corroborated by the testimony of his secretary, Miss Keyes. Other evidence offered by the landlord fairly established the fact that the landlord at all times had the use and control of the alleyway and that there was free access therefrom without obstruction by fence or otherwise to the open yard in the rear of the two buildings and that the landlord used the alleyway and that open space as its business required. The tenant denied that he stated to Dillon that he did not care about the yard and testified that nothing was said to the effect that he was not to have the yard and also denied that he stated to Dillon, in substance, that his only objection was that the building was too large and was too near the house.

I am of opinion that the lease did not give the tenant the use of the yard or preclude the landlord from building therein. Respondent makes no claim to the use of the alleyway which formed part of the open space around the building. His theory is that the yard was inclosed and that there was no access thereto excepting through the house. If that were so, the authorities cited (*People ex rel. Murphy v. Gedney*, 10 Hun,

151; *Doyle v. Lord*, 64 N. Y. 432, and *Cohen v. Newman*, 91 Misc. Rep. 561; *affd.*, on dissenting opinion of MADDOX, J., 173 App. Div. 976) would tend to sustain his claim, but his theory is not sustained by the evidence. It is not only improbable that the landlord would have given the tenant the use of the yard when it had theretofore filed plans for the erection of a building therein, but the terms of the lease and the preponderance of the evidence show that such was not its intention. No entry by the landlord constituting an actual partial eviction which would entitle the tenant to remain in possession of the remainder of the premises without paying any rent (2 McAdam Landl. & Ten. [4th ed.] 1385, § 406; *Christopher v. Austin*, 11 N. Y. 216; *Fifth Avenue Building Co. v. Kernochan*, 221 id. 370; *Lodge v. Martin*, 31 App. Div. 13), as he claims the right to do here, was shown, and it is well settled that even if there were a constructive eviction which here could be predicated only on the increase in the noise and vibrations and interference with light and air as to all or part only of the premises without an actual abandonment of the premises by the tenant, that would not be a defense to an action for rent. (2 McAdam Landl. & Ten. 1385, § 406; *Edgerton v. Page*, 20 N. Y. 281; *Boreel v. Lawton*, 90 id. 293.)

It follows, therefore, that the determination of the Appellate Term should be reversed, with costs, and the order of the Municipal Court reversed, with costs, and a final order granted as prayed for by the landlord.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Determination and order of Municipal Court reversed, with costs and disbursements in this court and in the Appellate Term, and final order granted as prayed for by petitioner, with costs.

MAMIE CONTI, Respondent, v. MAX COHEN, INC., Appellant.

First Department, May 27, 1921.

**Master and servant — contract of employment at salary and percentage of profits — action to recover percentage of profits — complaint insufficient which does not allege that profits were earned.**

In an action on a contract of employment at a fixed salary and certain percentage of net profits brought to recover the plaintiff's percentage of the profits, the complaint does not state a cause of action where the plaintiff alleges merely on information and belief that the defendant failed and refused to pay to the plaintiff a sum equal to the percentage of the net profits earned by the defendant during any year or period of accounting and that by reason thereof the defendant owes to the plaintiff the sum demanded in the complaint, and does not allege or show that any profits were earned by the defendant during any accounting period, for it was incumbent upon the plaintiff to show that profits were earned and not paid over as agreed.

APPEAL by the defendant, Max Cohen, Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of April, 1921, overruling defendant's demurrer to the complaint.

*I. Maurice Wormser* [*I. Gainsburg*, attorney], for the appellant.

*Lloyd Paul Stryker* of counsel [*Lorenz J. Brosnan* with him on the brief; *Whiteside & Stryker*, attorneys], for the respondent.

LAUGHLIN, J.:

The plaintiff was employed by the defendant as a designer for the period of two years from the 23d day of June, 1915, pursuant to a contract in writing made between the parties on the 21st of June, 1915. Her compensation was to be \$100 per week and in addition thereto a sum equal to twenty per cent of the net profits per annum earned by the defendant. She was paid the weekly compensation and brought this action to recover the percentage of profits. The only allegation of the complaint with respect to profits is an allegation upon information and belief that "the defendant failed and

refused to pay to the plaintiff a sum equal to twenty per cent. (20%) of the net profits earned by the defendant during any year or period of accounting," and that "by reason of the premises there is now due and owing from the defendant to the plaintiff the sum of One hundred thousand dollars (\$100,000)," for which amount she demands judgment, with costs.

The contract provided that the net profits were to be computed at the end of every six months and paid upon the taking of stock and the ascertainment of the net profits earned by the business for the six months' period, and that the plaintiff should have the right at the time of taking the stock and computing the net profits to have access to the books of the defendant "so that the figures and the stock taking shall be fully known to her and that she shall have full access to any records with respect to the ascertainment of the said net profits so earned as aforesaid." On a former appeal on the authority of *Funger v. Brooklyn Bottle Stopper Co.* (132 App. Div. 837) we reversed an order granting the plaintiff an inspection of the defendant's books to enable her to frame a complaint. (*Conti v. Cohen, Inc.*, 195 App. Div. 932.) Our reversal on *Funger v. Brooklyn Bottle Stopper Co.* (*supra*) plainly indicated that we were of opinion that the plaintiff should have obtained an order for the examination of the defendant for the purpose of identifying the books, an inspection of which might become necessary, and should have made an application then for a limited inspection. Moreover, the plaintiff did not show that at the time of the respective accountings she was deprived of the right given to her by the contract to examine the stock and books of the defendant and to ascertain for herself whether or not the accounting was had in accordance with the contract. The plaintiff, instead of applying for an order for the examination of the defendant and requiring the production on the examination of its books and thus ascertaining the profits, if any, or showing that the accountings were inaccurate, saw fit to attempt to frame a complaint by merely charging generally, as already shown, that she has not been paid twenty per cent of the profits earned during any accounting period. We are of the opinion that the complaint is insufficient in that it does not

show that any profits were earned by the defendant during any accounting period. It is argued theoretically by the respondent that an allegation that there were profits is necessarily implied in the allegations made, but we think not and that it was incumbent upon the plaintiff to show that profits were earned and not paid over as agreed. (*Mitchell, Schiller & Barnes v. Follett Time R. Co.*, 142 App. Div. 687; *Nekarda v. Presberger*, 123 id. 418; *Tooker v. Arnoux*, 76 N. Y. 400; *Clark v. Dillon*, 97 id. 370, 373; *Stabilimento Metallurgico Ligure v. Joseph*, 189 App. Div. 173, 177; 13 C. J. 724, 725.)

It follows that the order should be reversed, with ten dollars costs and disbursements, and the demurrer sustained, with ten dollars costs, with leave to the plaintiff to amend upon payment of the costs of the appeal and of the motion.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and demurrer sustained, with ten dollars costs, with leave to plaintiff to serve an amended complaint on payment of said costs.

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WILLIAM A. STREET, as Surviving Trustee under a Certain Deed of Trust Made and Executed by HENRY MORGAN on December 30, 1880, Respondent, v. ALICE LEE POST and Others, Appellants, Impleaded with ADELA O. GIRDNER and Others, Respondents.

First Department, May 27, 1921.

**Trusts** — trust in personal property for benefit of intended wife for life with reversion to grantor on her death or to his representatives or legatees on his predeceasing beneficiary — assignee for benefit of creditors of grantor not entitled on claim first made more than twenty-five years after creation of trust — wife entitled to one-third of principal on death of grantor — wife's one-third passes to her executrices.

In an action to construe a trust deed it appeared that the grantor, in contemplation of marriage with the beneficiary, executed the deed in question for the benefit of his intended wife; that said trust deed provided, among other things, that "upon the death of \* \* \* the said intended wife,

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upon which event it is hereby declared the said trust shall terminate, to transfer and deliver over the capital of the said trust fund to the said Henry Morgan [grantor], if he be then living, and if the said Henry Morgan be then dead then to his personal representatives or to whomsoever may be entitled under his last will and testament to receive the same as part of his estate, it being hereby expressly declared and agreed that the whole residuary interest \* \* \* is reserved to and shall belong to the said Henry Morgan as his property." The grantor predeceased the beneficiary.

*Held*, that an assignee for the benefit of creditors of the grantor was not entitled to claim any portion of the capital fund as more than twenty-five years had elapsed since the assignment and he had made no previous attempt to take possession of the property.

The trust deed gave to the grantor's wife a life estate only in the trust fund and reserved to the grantor all other interest in the property.

On the death of the grantor intestate the widow was possessed not only of the life estate in the entire fund but also of her one-third to which she was entitled under the laws of this State, and on her death her one-third passed to her executrices.

APPEAL by the defendants, Alice Lee Post and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 6th day of April, 1920, on the decision of the court rendered after a trial at the New York Special Term.

*Albert de Roode* of counsel [*Thomas B. Gilchrist* with him on the brief; *Cadwalader, Wickersham & Taft*, attorneys], for the appellant Robert LeRoy.

*Henry A. Forster*, attorney for the appellants Arthur Frederic Street and others.

*Henry C. Beadleston*, attorney for the appellants Alice Lee Post and others.

*Jabish Holmes*, for the appellant Dixon, as assignee, etc.

*Lee McCanniss*, for the respondents Adela O. Girdner and others.

SMITH, J.:

The appellants are the next of kin of Henry Morgan. The respondents are the executrices of the will of Penelope Overton

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Morgan, the widow of Henry Morgan, who have been awarded a one-third interest in a trust fund created by Henry Morgan during his lifetime in favor of Penelope Overton White, as a marriage settlement to become effective upon his marriage to her. The parties were thereafter married. The provisions of the trust deed of which construction is asked are as follows:

"Now this indenture witnesseth, that in consideration of the premises and of the said intended marriage, and for other good and valuable considerations him thereunto moving the receipt whereof is hereby acknowledged, the said Henry Morgan doth, simultaneously with the execution and delivery hereof, pay and deliver over to the said parties of the second part the sum of one hundred thousand dollars in cash the receipt whereof is hereby by them acknowledged, which sum and the investments and reinvestments thereof it is hereby declared and agreed shall constitute a trust fund to be held by the said parties of the second part as Trustees and the survivor of them and their or his successors or successor in the trust, upon the trust following that is to say: To invest and from time to time during the continuance of the trust to reinvest the same and keep the same invested as hereinafter provided, and until the said intended marriage shall be solemnized to have and to hold the same and the income thereof for the use and benefit of the said Henry Morgan, and upon the further trust, from and after the solemnization of the said intended marriage and during the natural life of the said Penelope Overton White, the said intended wife, to pay over the whole net income from time to time arising from the said trust fund and coming to the hands of the said Trustees or Trustee, after deducting all proper expenses and charges including taxes if any such shall be lawfully imposed, to the said Penelope Overton White, the said intended wife for her sole and separate use and benefit, and upon the death of the said Penelope Overton White the said intended wife, upon which event it is hereby declared the said trust shall terminate, to transfer and deliver over the capital of the said trust fund to the said Henry Morgan, if he be then living, and if the said Henry Morgan be then dead then to his personal representatives or to whomsoever may be entitled under his last will and testament to receive the same as part of his estate,

it being hereby expressly declared and agreed that the whole residuary interest in said trust fund after satisfying the purposes of the said trust by payment over of the net income to the said Penelope Overton White during her life as aforesaid is reserved to and shall belong to the said Henry Morgan as his property."

Thereafter Henry Morgan died in 1891, intestate, and left him surviving his wife and four children. Three of these children have since died, themselves leaving descendants. These children were all children by a former wife of Henry Morgan. Penelope Overton Morgan had no children either by her former marriage or by her marriage with Henry Morgan. Penelope Overton Morgan, the widow of Henry Morgan, died in 1918 having left a will and having appointed Adela O. Girdner and others as executrices thereunder.

The decision of the Special Term has given to the executrices of the widow one-third of the capital of this trust fund and the remaining two-thirds has been given to the next of kin of Henry Morgan. (See 109 Misc. Rep. 228.) No question is here raised as to the division between these next of kin. The next of kin of Henry Morgan are appealing from this decision, contending that the executrices under the will of the widow are not entitled to any part of the fund, but that the fund belongs entirely to the next of kin of Henry Morgan.

Before discussing this question raised by the appeal it may be well to consider the appeal of William P. Dixon, as assignee for the benefit of creditors of Henry Morgan, who claims the entire fund under an assignment for the benefit of creditors made by Henry Morgan in 1884. There was no attempt made by said assignee, however, to take possession of the property. This action was brought in 1919, more than thirty-five years after this assignment for the benefit of creditors and no claim had at any time been made before that time of any interest by the said assignee. By section 110 of the Real Property Law it is provided that "Where an estate or interest in real property has heretofore vested or shall hereafter vest in the assignee or other trustee for the benefit of creditors, it shall cease at the expiration of twenty-five years from the time when the trust was created, except where a different limitation is contained in the instrument creating the trust,

or is especially prescribed by law. The estate or interest remaining in the trustee or trustees shall thereupon revert to the assignor, his heirs, devisee or assignee, as if the trust had not been created." By section 11 of the Personal Property Law the same rule seems to be applicable to personal property. (*Mills v. Husson*, 140 N. Y. 99; *National Park Bank v. Billings*, 144 App. Div. 536; *affd.*, on opinion below, 203 N. Y. 556.) Inasmuch, therefore, as more than thirty-five years have passed since the creation of the trust before any claim was made by the assignee for any part of this fund, the trust had ceased and the assignee had been divested of all the interest of the assignor in the fund.

As I read the trust deed the intent of the grantor seems to me clear to give to the woman whom he afterwards married, as her marriage settlement, a life estate and a life estate only in this trust fund of \$100,000. By the last clause of the deed this seems to be made perfectly plain, wherein he states that it is "expressly declared and agreed that the whole residuary interest in said trust fund after satisfying the purposes of the said trust by payment over of the net income to the said Penelope Overton White during her life as aforesaid is reserved to and shall belong to the said Henry Morgan as his property." Words could hardly have been chosen to express more clearly his intention to give only a life estate to Penelope Overton White and to reserve to himself all other interest in the property. Nor does any part of this deed express any other intention. Upon the death of Penelope Overton White the capital of the trust is to be transferred and delivered to Morgan if living, and if dead "to his personal representatives or to whomsoever may be entitled under his last will and testament to receive the same as part of his estate." Immediately following this clause is the clause which reserves to the said Morgan as *his property* all the interest in that estate other than the life interest given to Penelope Overton White. If a will had been executed by Morgan the legatees under that will would not have taken as appointees under the trust deed. They would have taken as legatees of Henry Morgan under his will. It is clear also that the personal representatives to whom reference is made are his administrators who are appointed in law to distribute his property and they do not take in any

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way as appointees under this trust deed. The express declaration is that if he be dead his personal representatives or the legatees under the will shall receive the same "*as part of his estate.*" This means as part of his estate of which he has died intestate or for which he has made provision by his will. The executrices of Penelope Overton White take nothing whatever under the trust deed. They take under the intestate laws of the State the moneys to which their testatrix was at all times entitled after the death of Henry Morgan, to wit, one-third of his personal property as his widow. As before stated, there is no indication of any intention by that deed to grant any further estate than a life estate to Penelope Overton White. Where, however, the full residue is reserved to the testator himself and he dies intestate, the property passes, not by reason of an *expressed* intention, in the deed or otherwise, but by virtue of the laws of the State. After his death Penelope Overton Morgan, then his widow, was possessed not only of the life estate in all of this fund under the trust deed but also of her share of the personal property of which he died intestate under the State laws, which was one-third of this trust fund, to which these executrices now make claim, and judgment for which they have been awarded. In my judgment, therefore, the conclusion reached by the judge at Special Term properly gave to these executrices of Penelope Overton Morgan one-third of the capital of said trust fund, and the next of kin of Henry Morgan, deceased, the remaining two-thirds, and the judgment should be affirmed, with costs to all parties separately appearing and presenting briefs herein payable out of the estate.

CLARKE, P. J., LAUGHLIN, PAGE and MERRELL, JJ., concur.

Judgment affirmed, with costs to all parties separately appearing payable out of the estate.

In the Matter of Proving the Last Will and Testament of  
ROSA E. SPANG, Deceased.

GEORGE W. WICKERSHAM and Others, Appellants, Respondents;  
MABEL SPANG ANCKER, Respondent, Appellant;  
MARIE T. MOORE, Respondent.

First Department, May 27, 1921.

**Wills — probate — sufficiency of evidence to overcome presumption of sanity of testator — rules for considering verdict of jury on appeal — verdict that deceased was not of sound mind not against weight of evidence.**

A mere scintilla of evidence is not sufficient to overcome the presumption of the sanity of a testator, and the verdict of a jury must be considered and its effect determined under the same rules that govern the court in the review of the verdict of a jury in other cases where, by the Constitution, or by statute, the parties have the right to a jury trial.

In determining whether the verdict of a jury in proceedings to probate a will is against the weight of the evidence the question is whether the finding of the jury was so far against the weight of the evidence as to indicate passion or prejudice as the procuring cause of the verdict.

On all the evidence, *held*, that the verdict of the jury that the testator was not of sound and disposing mind at the time the will was executed was not against the weight of the evidence.

APPEAL by George W. Wickersham and others from a decree of the Surrogate's Court of the county of New York, entered in the office of said surrogate on the 15th day of April, 1920, as resettled by a decree entered in said surrogate's office on the 14th day of May, 1920, on the verdict of a jury adjudging that two papers offered for probate as the last will and testament and codicil thereto of Rosa E. Spang were executed by her at a time when she did not have testamentary capacity to execute the same and denying probate thereof, and also from an order entered in said surrogate's office on the 15th day of April, 1920, denying appellants' motion to set aside the verdict returned by the jury as to issues numbered V and X and to set aside the general verdict in favor of the contestants rendered by the jury upon direction of the court and for a new trial made upon the minutes.

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Appeal by Mabel Spang Ancker from so much of said decree as orders, adjudges and decrees that the execution of the papers offered for probate herein was not caused or procured by the undue influence or fraud of any person or persons.

Pursuant to stipulation dated December 16, 1920, an order was granted by the Appellate Division on December 17, 1920, dismissing the latter appeal.

*Henry W. Taft* of counsel [*Thomas B. Gilchrist* with him on the brief; *Cadwalader, Wickersham & Taft*, attorneys], for the proponents.

*Edgar T. Brackett* of counsel [*Hiram C. Todd* with him on the brief; *Brackett, Todd, Wheat & Wait*, attorneys], for the contestant Ancker.

SMITH, J.:

Rosa E. Spang died June 22, 1919, at the age of seventy-eight years. Charles H. Spang, her husband, died February 14, 1919, at the age of eighty-five years. The property of which she died seized was mostly property that came from her husband. By her husband's will, after deducting some minor legacies, a daughter, Mabel, was given an annuity of \$20,000 a year, and the widow was given the income from the balance of the property. After the death of the life annuitants the property was to be given in part for certain specific purposes named and the remainder to his executors to be distributed for charitable purposes as they might select. Under the laws of the State of Pennsylvania, of which State her husband was a resident at the time of his death, the widow had the right to elect to take under the will or to take one-half of the husband's property.\* She assumed to make such an election just prior to her death to take one-half, and if that election be a valid election, the estate of Rosa E. Spang at the time of her death amounted to about \$1,600,000.

By the paper sought to be proven as her will, Rosa E.

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\* See Wills Act of 1917 (Penn. Laws of 1917, p. 410, No. 190), § 23; Intestate Act of 1917 (Penn. Laws of 1917, p. 431, No. 192), § 1.—[REp.]

Spang, after giving some minor legacies and providing for the payment of inheritance taxes out of the estate, provided for the establishment of a charitable organization to be called the Rosa Spang Foundation, and gave to that corporation so to be organized the residue of her property, subject, however, to the payment to her daughter Mabel of an annuity of \$10,000 for life. The charities which were to be the beneficiaries of the income under this Rosa Spang Foundation were described to be for "the relief of poverty and distress, and especially in caring for young children and babes, who by reason of orphanage, abandonment or otherwise, are without means of proper support and maintenance; in providing for the education, instruction and aid of the deserving blind; and also in affording temporary relief to unobtrusive suffering endured by industrious or worthy persons, including the bestowal or distribution of any part of such income to and among benevolent or charitable institutions, objects or persons, such as shall be deemed most useful, deserving or judicious."

Charles H. Spang and Rosa E. Spang were married in 1898. The daughter Mabel was born in 1885. There is no question raised as to the parentage of this daughter and she was accepted both before the marriage of her parents and afterwards as their child and provided for as such. The codicil to this will simply provided for a legacy to Charles C. Lockwood of \$10,000 and was executed immediately after the execution of the will, and in discussing the issues in the case the will and codicil will be referred to simply as the will of Rosa E. Spang. When this paper was offered for probate, Mabel Ancker, the daughter, filed objections alleging that the will was not executed with proper formalities, that the same was procured by undue influence and that the paper was executed at a time when Rosa E. Spang was of unsound mind and without testamentary capacity to execute a will. Objections were also filed by Marie T. Moore who was a legatee under a prior will. Mabel Spang, the daughter, was first married to a man by the name of Crome and after his death was married to a man by the name of Ancker. She was in Europe at the time of the death of her father and only reached America a couple of days before her mother's death. She had had considerable difficulty in getting passports by reason

of the fact that when she went to Europe her passports were given to her under her former name of Mabel Crome, and she secured passports authorizing her return under the same name, and as she desired to return to Europe she used the name of Crome in this country and first filed the objections under that name.

Upon the trial of the issues before the jury all questions were by the court withdrawn from the consideration of the jury except the question as to the testamentary capacity of the deceased at the time of the execution of the will and of the codicil, and upon that question the jury has found that the deceased had not testamentary capacity at the time she signed the paper offered for probate as her will and codicil. From the decree entered upon this finding this appeal has been taken by the executors named in the will.

In the briefs of counsel criticism is made on the one hand of Mr. Lockwood's actions as bearing upon his interest in this case. I find nothing in the record, however, which justifies any adverse criticism. There was no effort on his part to obtain any advantage for himself or for any one else whom he represented. Mrs. Spang became suspicious of him and desired to change her attorney and he himself brought Mr. Wickersham into the case. On the other hand, Mr. Wickersham has given full recognition to any obligation which he might owe to Mr. Lockwood, and himself procured the legacy of \$10,000 to Mr. Lockwood to be inserted in the codicil of the will. Criticism is made of the form of the will which gave to these executors personally any property which might fail to pass thereunder by virtue of any statutes against the passing of property under a will to charitable institutions made within certain periods before the death of the testatrix. The will as drawn contained no illegal provisions. Considerable criticism is made of the act of Dr. Chapin in excluding the daughter from her mother's room when she came there just prior to her mother's death. But this was done in accordance with the expressed wish and determination of the mother not to see her daughter, and it can well be surmised that any scene between them would have hastened her mother's death. These executors in this will were all men of standing in the community.



The only issue here argued is as to whether the finding of the jury is based upon sufficient evidence. In *Matter of Eno* (196 App. Div. 131), decided by this court April 8, 1921, the opinion of Mr. Justice PAGE states the rule which is to guide our determination of this question. It is there stated that a mere scintilla of evidence is not sufficient to overcome the presumption of the sanity of the party executing the will, and that the verdict of the jury must be considered and its effect determined under the same rules that govern the court in the review of the verdict of the jury in other cases where, by the Constitution, or by the statute, the parties have the right to a jury trial. Upon this rule of law as there declared this court was unanimous, and the only question, as we view this case, which we are called upon to determine is as to whether under this rule the verdict is against the weight of evidence. Upon that question, further, we are controlled by the uniform rulings of the courts. The question is not as to what the reviewing judge would have decided if the case had been originally before him for determination, but the question to be determined is as to whether the finding of the jury was so far against the weight of evidence as to indicate passion or prejudice as the procuring cause of the verdict. While there is evidence in the case tending to establish the mental capacity of the decedent, there is much evidence to the contrary. There is evidence in the case as to the vulgarity of the deceased and perhaps of a depraved mind tending to eroticism, but such a perversion of the mind, even if abnormal, in no way entered into the making of this will. That tendency was perhaps caused by the physical condition of the deceased. But whatever the cause may have been, it had existed for many years prior to her death, so that under the evidence of the experts for the contestants it had little, if any, significance in determining whether at the time of the execution of the paper propounded as her will she had senile dementia, which is claimed to have incapacitated her from making a will. The brutality of the deceased to her husband in his last sickness as sworn to by the witnesses for the contestants, if not exaggerated, would indicate an abnormal mind, but no such perversion of the mind has in any way entered into or influenced the making of the will in question, although it may be generally

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pertinent as to the question of mental capacity to make a will. On the other hand, there is evidence of facts which are clear indications of senile dementia, which, if it existed, would have rendered her incapable of comprehending the natural claims to her bounty. To my mind one of the most significant facts which bear upon this question is her apparent vacillation in her regard for her daughter. This daughter in her younger days was sent to school and there came under the influence of a teacher who had acquired apparently an unnatural influence over her and the influence was a degrading one. To withdraw her from this influence the father and mother had her committed to a sanitarium. This was done upon the certificate of physicians according to the requirements of the statute. A habeas corpus proceeding was commenced which was tried in Brooklyn, and upon that proceeding the certificates of these physicians were produced and made public, and the daughter charged the mother as being an unnatural mother and stated publicly that her mother would lie about her and poison her if necessary to accomplish her purposes. She was finally released from the sanitarium and put in charge of another woman, with whom she was sent abroad, and she remained abroad for a number of years, and finally came home and was married to Crome, her mother and father attending the wedding. This proceeding before the court in Brooklyn caused deep resentment against the daughter on the part of the deceased, which seemed to return from time to time during the rest of her life. I say from time to time, because during this period there were times when the mother is shown to have spoken kindly of her, while towards the close of her life her picture which hung upon her mother's wall was turned face to the wall and she spoke very bitterly of her daughter. Before her husband's death she had executed a will giving her personal property to Mrs. Marie T. Moore. At the time of her husband's death Mr. Lockwood was the attorney for her husband, as well as her attorney. He called her attention to the fact that by this will all the property which she acquired from her husband which, if she elected to take under the Pennsylvania statute would amount to \$1,500,000, would go to Mrs. Moore. She at first insisted that all that the will meant was that her personal belongings

should go to Mrs. Moore, but afterwards, after explanation by Mr. Lockwood, she made a new will, in which she gave all of her property, after the payment of her debts, to her daughter Mabel. The making of this will is not in itself, as I view it, so significant, because of the conceded fact that it was made as a temporary will until a further will could be more deliberately drawn. But her expressions in connection with the making of that will are significant of her sentiments towards her daughter at that time. Mr. Lockwood swears that at the time she executed this new will in February, after her husband's death, she stated that she intended to draw a new will in which the bulk of her property should go to her daughter. The witness Harvey swears that after the making of this will and within five weeks after her husband died she asked her what would become of her things if she should die, and the deceased answered, "You damn fool, who do you suppose would get them but my daughter," and further, that the deceased said to her about three weeks before her death, "'Harvey, I am going to die,' and I said 'I wouldn't think so, Mrs. Spang; you have got plenty now; you can look after yourself and take care of yourself.' 'No,' she said, 'I am going to die, and if that Mabel would only be here,' she said, 'until this will is settled;' and I said: 'Well, now, Mrs. Spang, look here, why do you feel so badly?' 'Because,' she said, 'I am going to die, Harvey, but when I die I will make a will, and I will leave things to my friends; I won't do like Mr. Spang done.' I said: 'You will?' She said 'Yes; there are three I am going to remember outside of my child; that is Mrs. Keating, Mrs. Moore and Maggie Dunn.'" There is no doubt that about the time she made her will her antipathy to her daughter had returned. She had given orders that her daughter should not see her after she returned. As before stated, she had turned her daughter's picture face to the wall. The testimony shows that her gift to her daughter in the will was given by reason of the persuasion of Mr. Wickersham. The inconstancy of her feelings towards her daughter from the time of her husband's death to the time she died leaves serious doubt in the mind as to whether she was capable of appreciating the moral claims that her daughter had to her property. Moreover, she had told

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Mrs. Brown that she was to leave her \$25,000 in her will. After she executed the will, Mr. Lockwood swears Mrs. Brown told him that Mrs. Spang said to her that they did not draw the will in the way she wanted it. "It was a long rigmarole and I was too sick to understand it, you know I wanted to leave you \$25,000 as I told you, and I am afraid they have not got that in right; you take my handbag with all the jewelry, and if I die, keep it; it will help to make up for what you have done." This Mrs. Brown denies, except that she admits that Mrs. Spang told her that she would leave her \$25,000. The part of the conversation between Mrs. Brown and Lockwood as sworn to by Lockwood is not competent evidence of the facts therein stated. It is only competent, if at all, as tending to discredit the testimony of Mrs. Brown, who swore to facts tending to establish the mental capacity of the testatrix. She had said that she was going to leave money to Mrs. Keating and Mrs. Moore, but she left them nothing in her will. The testimony of Dr. Peterson, the expert, sworn in behalf of the proponents of the will, strongly tends to establish her mental capacity. On cross-examination, however, a number of instances were referred to which had been sworn to by other witnesses which Dr. Peterson himself said indicated, if true, "a lack of intelligent grasp of affairs." Her forgetfulness is an indication of a weakened mind, especially forgetfulness of an important incident occurring shortly before. She forgot that the will she had made in favor of Mrs. Moore had been destroyed and doubted if that had been done. She signed the election to take under the Pennsylvania statute which gave to her a million and a half of property, and yet, after having signed that paper she wrote to Mr. Wickersham that she had no memory of signing it and was very skeptical of the signature. Very strong corroboration of the incapacity of the deceased is found in the testimony of six physicians who had treated her at periods within the last five years of her life, all of whom swore to a large number of acts during those times that they considered irrational. Still further is the testimony of two of the experts called for the contestants, who swear, upon the hypothetical question involving facts which the jury were at liberty to believe, that at the time of the making of the will, the deceased was suffering from senile

dementia and incapable of understanding the nature of her act and its consequences.

This will was executed upon the day before the death of Rosa E. Spang. She was confessedly, at that time, in a very feeble condition. Within a few days she had had several attacks of heart trouble, which were apparently due not only to her age, but to a disease which was cancerous in its nature and which affected her whole system. Upon the night before she had had a very serious attack from which it was at times doubtful if she would recover. There is considerable evidence of her having expressed strong aversion to children, calling them little brats, and strong aversion to organized charities, and of her having expressed the belief that the moneys given for those charities never reached the persons sought to be benefited by the charities. And still the provisions of the will were in part for the benefit of children and authorized the giving of these moneys by the trustees of the Rosa Spang Foundation to charitable institutions for distribution. These provisions in the will might have been found by the jury to have indicated a change of purpose which is, at least, significant upon the mental capacity of the deceased at the time she executed the will, and the jury might have been in doubt as to whether she fully understood its provisions, by reason of her physical condition at the time she executed it. One of the facts to be considered in sending a case back for a retrial is the probability that a different conclusion will be reached upon a subsequent trial. In my judgment, the result of a new trial would be the same as that reached by the jury in the verdict here rendered.

In this recital I have not mentioned many other incidents to which weight is given by the physicians as indicating the mental lapses of the deceased and the senile dementia. It clearly cannot be said that the verdict is without evidence to support it, nor in my judgment can it be said that the verdict indicates passion or prejudice on the part of the jury. The law has given the right to determine the facts in these cases to a jury, and we are not authorized to reverse their finding merely because we might individually have reached a different conclusion.

Without further discussion the decision which we have

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reached is that upon the appeal of the executors the decree must be affirmed, with costs out of the fund to all parties presenting briefs. The appeal of the contestants is dismissed.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ., concur.

Decree affirmed, with costs to all parties payable out of the estate, and appeal of contestants dismissed.

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ARTHUR KUNZE and Others, Respondents, v. JOSEPH N. WEBER and Others, Appellants.

First Department, May 27, 1921.

**Corporations — membership corporations — Musical Mutual Protective Union, incorporated as membership corporation, affiliated with American Federation of Musicians, an unincorporated association, is subject to laws of this State — internal management of corporation not subject to control of unincorporated association — action of board of directors of corporation in suspending president not subject to review by president of unincorporated association — action of president of unincorporated association in suspending members of board of directors of corporation unjustified — said members had right to resort to courts — injunction order contained sufficient recital of grounds on which granted.**

The plaintiffs are a majority of the board of directors of the Musical Mutual Protective Union, a membership corporation organized under the laws of this State, which is affiliated with the American Federation of Musicians, an unincorporated association having members in different States. In the by-laws of the Protective Union appeal from any decision of the board of directors to the executive board and the convention of the federation is provided for.

*Held*, that while the primary purpose of the federation is the formation of unions not incorporated under the laws of any State, this does not prevent a local union becoming incorporated and thereafter affiliating with the federation, but if such corporation is accepted by the federation the acceptance is subject to the laws of the State under which the local union is incorporated.

The directors of the union having suspended its president under the power conferred on them by the by-laws of the union and having given notice

to him of the charges and a time and place for hearing, they were justified in disregarding an order issued by the president of the federation, called an emergency order, staying all proceedings for the presentation and hearing of charges against the president of the union, enjoining them from acting as directors of the union, and generally from taking any action against its president.

The power to regulate the internal affairs of the union is given under the laws of this State and is not subject to interference by the federation, and the fact that the union was affiliated with the federation did not give the latter, nor its president, any jurisdiction or power to interfere with the internal management of the union.

The right to suspend the president of the union, given to the majority of the board of directors thereof under the by-laws which were passed in pursuance of the laws of this State, is not subject to review by the president of the federation, and the president of the union having been suspended neither the federation nor its president had the right to reinstate him and enjoin the members from interfering with his acting as president nor the right to enjoin the trial of the charges.

The remedy of the suspended president was through the union and its by-laws and not by appeal to the federation, except so far as the right to appeal was given by the by-laws.

The president of the federation exceeded his powers in expelling the plaintiffs therefrom and notifying employers of musicians of the expulsion, since that power lies with the executive board of the federation, and the injunction restraining the officers of the federation and of the union from preventing the plaintiffs from exercising their rights as members of the union and restraining the president of the union from acting as such was properly granted. Said order of expulsion cannot be justified under the emergency clause of the constitution and by-laws of the federation in which certain powers are given to the president in emergencies, for that clause will not be construed by the courts to give him any further powers than are necessary to preserve the *status quo*, or to protect the federation till action can be taken by the executive council or the federation in convention.

The plaintiffs had a right to resort to the courts since they were expelled without hearing and deprived of their means of livelihood, without any opportunity for an immediate and prompt review of the action of the president of the federation.

The order to show cause and the temporary injunction did not purport to suspend the president of the union but merely to give effect to the suspension legally made by the board of directors, and to restrain the president from acting in contravention thereof.

The said orders sufficiently state the grounds on which they were granted as required by section 610 of the Code of Civil Procedure.

APPEAL by the defendants, Joseph N. Weber and others, from an order of the Supreme Court, made at the New York

Special Term and entered in the office of the clerk of the county of New York on the 26th day of February, 1921, granting plaintiffs' motion for a temporary injunction restraining the officers of the American Federation of Musicians and the officers of the Musical Mutual Protective Union from interfering with or preventing the plaintiffs from exercising their rights and privileges as members of the Musical Mutual Protective Union, from giving notice that the plaintiffs had been expelled from the union and from issuing notices calling for the election of directors of the union or proceeding to elect directors, and restraining the president of the union from exercising any of the powers of the president.

*William P. Maloney*, for the appellants.

*George Edwin Joseph* of counsel [*Jacob J. Schwebel*, attorney], for the respondents.

SMITH, J.:

The plaintiffs are eight directors of the Musical Mutual Protective Union and constitute a majority of the board. This Protective Union is a membership corporation organized under the laws of the State of New York. The American Federation of Musicians is an unincorporated association containing members in different States. It is provided in the articles of association of the federation that any musical union may be affiliated with them. The Protective Union has been affiliated with the American Federation and in the by-laws of the Protective Union appeal from any decisions of the board of directors of the Protective Union to the *executive board* and the *convention* of the federation is provided by article 1, section 6, of the by-laws of the Protective Union. It is also provided that the Protective Union shall send the president and two delegates to the convention of the American Federation.

The plan of the American Federation seems to be primarily for the formation of local unions not incorporated under the laws of any State. This does not prevent, however, a local



union becoming incorporated and thereafter becoming affiliated with the American Federation. If such corporation, however, is accepted by the American Federation, it must be subject to the laws of the State under which the local union is incorporated. Of course the federation may refuse membership to members of the local union other than a local union independent of such a corporation. But this has not been done in the case at bar, and the Protective Union is still a membership corporation organized under the laws of this State, and is affiliated with the federation.

It is not quite clear as to just the nature of the membership in this American Federation. Sometimes the unions themselves are referred to as the members. Other times the members of the local unions are referred to as members of the federation. A fair interpretation, however, is that the members of these local unions become members of the federation *ipso facto* when the local union is organized under or affiliated with the federation and the existence of the local unions as members is simply an administrative factor to accomplish the purposes sought to be accomplished by the federation.

With this condition of the membership of the American Federation we may refer to the facts of the particular case, in order to ascertain just what questions arise for determination. One Finkelstein had been elected the president of this Protective Union. There arose a difference in the union over the acts of Finkelstein, and the eight members of the board of directors preferred charges against the president, suspended him as president and gave him notice of a hearing. Finkelstein, as president, had refused to put motions that were properly made in a meeting of the board of directors. He appointed a man as sergeant-at-arms, who was not confirmed by the board, as he was required to be and he, nevertheless, issued warrants for the payment of his salary on the ground that he was a holdover. Clearly he was not a holdover if his original employment was not confirmed. There are other charges against Finkelstein but it is probably immaterial here to consider whether they were sufficient to authorize his removal as the president of the Protective Union. Finkelstein went to the defendant Weber, who is the president of the American Federation, and Weber immediately issued an order

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which he called an emergency order staying all proceedings for the presentation or consideration of charges against Finkelstein, and enjoining these directors from acting as directors of the Protective Union and generally prohibiting them from taking any action as against Finkelstein as president of the Protective Union. The directors disregarded this order of Weber on the ground that it was without jurisdiction. It seems clear to me that it was without jurisdiction. This corporation is a corporation with a statute regulating its affairs. It was authorized to make by-laws, and the by-laws adopted provided how the president could be removed. The directors took proceedings for the removal of the president by making charges and giving him notice of a hearing, and meantime they suspended him from acting as president. Then came the order from Weber. It seems clear that the mere fact that that this Protective Union was affiliated with the American Federation neither gives to the federation nor to the president thereof the power to interfere with the internal management of the corporation. If the union itself had committed any act which was repugnant to the purposes of the federation, the right of affiliation might have been withdrawn. The power, however, to regulate the internal affairs of this corporate union is given under the laws of the State and is not subject to interference from this unincorporated association. In this respect the rights of the members of this union materially differ from the rights of members of a union organized under the federation itself, wherein the federation might itself make laws which defined and designated those rights. The right to suspend an officer of the corporation given to the majority of the board of directors under the by-laws passed in pursuance of the laws of the State is not subject to review by this president of the federation. Under the orders which were disregarded by these directors and for which these directors have been expelled, the president of this federation assumed to take the power given by law to the directors of the Protective Union away from those directors. This was in excess of the president's authority. Having suspended this president of the Protective Union as might be lawfully done under their by-laws, neither the American Federation nor the president of the federation had the right

to reinstate him and enjoin the members from interfering with his acting as president while he was so suspended. Nor had the federation or its president the right to enjoin the trial of the charges made against the president of the Protective Union. The remedy of the president of the Protective Union was through the corporation and its own by-laws and not by appeal to the American Federation, except so far as the right of appeal was given by the by-laws of the Protective Union itself. When the eight directors disregarded this order of the president staying the action of the local union, the president made another order in which he first made all members of any affiliated union members of the federation, and by a later order expelled these eight members. Of course, if these men were not members of the federation he could not make them members of the federation merely for the purpose of expelling them. It was not necessary to make them members of the federation. They were already members. But even if this corporation had not been incorporated this president had no authority to expel these members thus summarily without giving them a hearing, even if he had the right to expel them at all. But he has expelled them and notified the employers of musicians that they were expelled as members, which has resulted in their being thrown out of employment. The emergency clause in the constitution and by-laws of the federation, in which powers are given the president in emergencies will not be construed by the courts to give him any further powers than are necessary to preserve the *status quo*, or to protect the federation until action can be taken by the executive council or the federation in convention. The power to expel is given to the executive board of the federation and not to the president. Otherwise, if the executive board were not in actual session, the president would have the power to expel any one and call it an emergency matter which would hold until the next meeting of the convention which might be a year off. This would be true even if the union were not a corporation. Such a power involving property rights is denied because inequitable. This order was clearly in excess of any powers, emergency or otherwise, and an injunction was properly granted to prevent this president exercising any such powers. That these by-laws

cannot authorize this president to deprive plaintiffs of their rights as members of the corporation by any emergency clause comes directly within the ruling of the Court of Appeals in *Matter of Brown v. Order of Foresters* (176 N. Y. 132).

It is claimed, however, that these respondents have no right to appeal to the courts until they have exhausted their remedies within the corporation. As a general proposition this is true. But here these men have been expelled and notice of their expulsion given and they have been deprived of their livelihood, without a hearing. There is no provision under the by-laws of the American Federation for any appeal from any emergency order of the president except to bring the matter up at the next convention. If there were any such provision for review, it must be prompt in its action, otherwise the power to expel a member as an emergency act would be unreasonable and invalid.

The point is made by the appellants that neither the judge granting the order to show cause, nor the Special Term which made the order appealed from had power to suspend or remove the president of the Protective Union. They cite as their authority sections 305 and 307 of the General Corporation Law. These sections provide how injunctions suspending trustees or officers may be granted by the courts but they contain no prohibition or regulation as to suspension by the directors. The by-laws of the Protective Union do provide for such action by its board of directors. They may prefer charges against any officer, and on notice he may be tried and removed. In the meantime he may be suspended from acting. The order to show cause and the order appealed from do not attempt to suspend or remove Finkelstein. They simply give effect to the suspension by the directors and restrain Finkelstein from acting in contravention of such suspension. Another point is made that the orders do not state the grounds on which they were granted as required by Code, section 610. There seems to be a sufficient recital of the grounds where in the first paragraph the order states in effect that defendants are molesting and preventing the plaintiffs from exercising their rights as members of the Protective Union, and that it satisfactorily appears from the complaint that the commission of the acts complained of will

produce injury to the plaintiffs. (*Richards v. Goldberg*, 7 Misc. Rep. 389, 390.)

The order should, therefore, be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ.,  
concur.

Order affirmed, with ten dollars costs and disbursements.

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LEONARD WERNER and Others, Respondents, v. JOSEPH N.  
WEBER, Appellant.

First Department, May 27, 1921.

**Corporations — membership corporation affiliated with unincorporated association — order issued by president of unincorporated association directing members of corporation to show cause why they should not be expelled from association was improper.**

The order issued by the defendant as president of the American Federation of Musicians, an unincorporated association, directing the plaintiffs, directors of the Musical Mutual Protective Union, a membership corporation, to show cause before the convention of the federation why they should not be expelled as members of the federation, was not proper under the general rules of the federation or as an emergency measure, since, under said rules, the expulsion of members first comes before the executive council and an appeal therefrom may be taken to the convention.

(See, also, head note in *Kunze v. Weber*, ante, p. 319.)

APPEAL by the defendant, Joseph N. Weber, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 26th day of February, 1921, granting plaintiffs' motion for a temporary injunction.

*William P. Maloney*, for the appellant.

*George Edwin Joseph* of counsel [*Jacob J. Schwebel*, attorney],  
for the respondents.

SMITH, J.:

This action is brought to restrain the defendant Weber and any one acting for him and by his direction from proceeding under an order issued by him which compelled these plaintiffs

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to show cause before the convention of the American Federation of Musicians why they should not be expelled as members of the federation. There was no temporary restraining order in this order made by the defendant compelling these plaintiffs to show cause. The controversy arises over substantially the same matters as are discussed in the case of *Kunze v. Weber* (197 App. Div. 319), herewith decided. Under the rules of the federation, the expulsion of members first comes before the executive council and an appeal therefrom may be taken to the convention. This order of Weber, therefore, requiring these plaintiffs to show cause before the convention in the first instance can neither be sustained under the general rules of the federation, or as an emergency measure.

The same objection is urged to this injunction order as to its failure to state the grounds upon which it was granted. The order has substantially the same recitals as the orders in the *Kunze* case, herewith decided, and for reasons stated in the opinion filed in that case we are of opinion that the objection is not well taken.

The injunction order should, therefore, be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ.,  
concur.

Order affirmed, with ten dollars costs and disbursements.

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WAITT CONSTRUCTION COMPANY, INC., Appellant, v. AMANDA  
CHASE, Respondent.

First Department, May 27, 1921.

**Landlord and tenant — action for rent of unfurnished apartment in apartment hotel — defense that rent is unjust and unreasonable — “ hotel ” as used in Laws of 1920, chapter 136, § 9, as added by chapter 944 of Laws of 1920, defined — apartment hotel not within meaning of statute — complaint properly dismissed for failure to file bill of particulars prescribed by said statute.**

An apartment hotel in New York city containing 15 rooms furnished by the proprietor for transient guests, and 125 rooms divided into suites and rented unfurnished on term leases, is not a hotel within the meaning

of section 9 of chapter 136 of the Laws of 1920, as added by chapter 944 of the Laws of 1920, excepting rooms in a hotel containing 125 rooms or more, though there are no cooking facilities in any of the rooms, and the proprietor of the hotel maintains a restaurant in the building which is open to the occupants thereof as well as to the outside public and furnishes full service to the guests in the way of chambermaids, porters, scrubwomen and other servants.

The purpose of said statute was to protect and furnish housing facilities for dwellers within the cities contemplated by the act and was not intended to apply to transients or travelers passing through the city.

The fact that plaintiff's apartment hotel had fifteen rooms which were used for transient guests does not bring it within the exception in said statute.

Accordingly, in an action to recover rent for an apartment in said hotel, in which the defendant interposed the defense that the rent was unreasonable and unjust and that the agreement under which the same is sought to be recovered was oppressive, the complaint was properly dismissed where the plaintiff failed to file the bill of particulars prescribed by chapter 944 of the Laws of 1920.

APPEAL by the plaintiff, Waitt Construction Company, Inc., from an order and determination of the Appellate Term of the Supreme Court, First Department, entered in the office of the clerk of the county of New York on the 10th day of February, 1921, affirming a judgment of the Municipal Court of the City of New York, Borough of Manhattan, Fifth District, in favor of the defendant.

*Francis M. Scott* of counsel [*Frederic H. McCoun*, attorney], for the appellant.

*Sylvester Ryan* of counsel [*Joseph Glass* with him on the brief; *Olcott, Bonyngé, McManus & Ernst*, attorneys], for the respondent.

SMITH, J.:

The action is for rent for the month of October, 1920, for rooms in a building known as the George Washington at No. 116 West Seventy-second street in the city of New York. The defendant held under a written lease dated April 9, 1920. The only defense interposed was that the rent sought to be recovered for the rooms is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive. This form of defense in an action for rent is provided for by chapter 944 of the Laws of 1920, which

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amended generally and superseded chapter 136 of the Laws of 1920. Section 9 of chapter 136, as added by chapter 944, provides specifically: "This act shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or to a lodging house or rooming house occupied under a hiring of a week or less." The whole controversy in the Municipal Court turned upon the question whether or not the George Washington was an "hotel," the court finding that it was not an hotel and, therefore, inasmuch as the plaintiff had not filed the bill of particulars prescribed by chapter 944 of the Laws of 1920, the complaint was dismissed.

The facts in the case are practically undisputed. The building in question covers a plot 50 by 100 feet, and is fifteen stories in height. On each floor above the first floor there are ten rooms and six bathrooms, which in general are broken up into suites or units of two rooms and a bath, there being in all about one hundred and forty rooms. There are eighty-two suites in the building. Of these fifteen are fully furnished by the owner and reserved for the use of transient guests. The remainder of the suites are presumably rented on term leases and are furnished by the tenants who occupy them. There is a safe kept in the office, and notices are posted in the rooms warning guests to deposit their jewelry and valuables. There are no cooking facilities in any of those rooms, no kitchen or kitchenette. The plaintiff maintains a restaurant in the building which will accommodate about 100 persons and which is open to the occupants of the building, as well as to the outside public. The plaintiff furnishes the full service to the guests, employing about 37 persons. This includes chambermaids, porters, scrubwomen, boys to operate the elevators and to go on errands. There is a housekeeper who is on duty night and day. The building has upon it the sign "George Washington," and there is also a sign on the front of the building "Non-housekeeping apartments." The lease itself between the plaintiff and the defendant describes the plaintiff as the landlord and the defendant as tenant and states that the premises are "to be occupied as a strictly private dwelling apartment."

Chapter 136 of the Laws of 1920 includes within the opera-



tion of the statute "premises \* \* \* occupied for dwelling purposes" and expressly excepts from the operation of the statute "a room or rooms in a hotel, lodging house or rooming house."

Chapter 944, which in form amended chapter 136 by amplifying that statute and adding additional sections thereto, states the exception as follows: "§ 9. This act shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or to a lodging house or rooming house occupied under a hiring of a week or less." There is no doubt that a distinction is made between apartment houses, so called, and apartment hotels, so called. Apartment houses are generally understood as those houses which contain apartments to which is attached a kitchen, wherein it is contemplated that the family shall do its own cooking. An apartment hotel, so called, is generally understood to apply to those houses which contain non-housekeeping apartments without a kitchen or cooking facilities, wherein the proprietor furnishes a restaurant for feeding the occupants of the different apartments. Within this terminology the George Washington might be classed as a hotel, because the apartments were rented without cooking facilities and without kitchens. The room service was furnished by the owner of the apartment. The care of the rooms was provided by the proprietor and not by the individual tenants, and it may be strongly argued that there were present full hotel accommodations. But, with these facts acknowledged, the question is not fully answered as to whether what is generally called an apartment hotel is within the contemplation of the law which excepts hotels from the operation of the act in question. In order to ascertain what was meant in that statute by the use of the word "hotel," it is most important that we examine not only the phraseology of the statute, but the purpose of the statute. It seems clear that the purpose of the statute was to protect and furnish housing facilities for dwellers within the cities contemplated by the act. The Legislature had no concern with transients or travelers passing through the city. This is emphasized by the remaining provisions of this very section 9, which exempts lodging houses and rooming houses "occupied under a hiring of a week or less." Apparently one

who hires a room in a lodging house or rooming house for more than a week is deemed to an extent a dweller in the city and not a mere transient or traveler temporarily stopping in the city.

The hotel, as it was first called, was the old inn, which is well defined as "A house of entertainment for travelers," or "A house where a traveler is furnished, as a regular matter of business, with food and lodging while on his journey." In 22 Cyc. 1070, note 2, it is said: "The words 'hotel' and 'tavern' are usually used as synonymous with 'inn;' and a hotel or tavern which is maintained for the accommodation of travelers is an inn." Further, "an inn or hotel is a house where all who conduct themselves properly and who are able and ready to pay for their entertainment are received, if there is accommodation for them, or who, without any stipulated engagement as to the duration of their stay or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging and such services and attention as are necessarily incident to the use of the house as a temporary abode." (Citing *Matter of Brewster*, 39 Misc. Rep. 689.) In 14 Ruling Case Law (p. 492) it is said: "He [the innkeeper] is distinguished from the proprietors of other public houses of entertainment in that he publicly holds out his place as one where all transient persons who choose to come would be received as guests." At page 494 the text reads: "It has frequently been held that the term 'hotel' is synonymous with 'inn,' and that the definition of an inn comprises a hotel, and in some jurisdictions, the word 'tavern' is also considered synonymous with 'hotel' and 'inn.'"

That this defendant would not be entitled to the rights of a guest at an inn has been settled in this department in the case of *Hackett v. Bell Operating Co., Inc.* (181 App. Div. 535). In that case the plaintiff had leased four rooms in the Netherland Hotel in New York city at the corner of Fifty-ninth street and Fifth avenue to be occupied solely as private living rooms, and it was held that the relation was that of landlord and tenant and not that of innkeeper and guest. It was further held that an innkeeper's liability exists only in the case of one who is a traveler and seeks the hospitality of the inn as a transient guest. These cases are only pertinent as

bearing upon the meaning of the word "hotel," as used in the exception specified in the statute, and as showing the clear distinction between the rights of transients or travelers, so-called, at an inn, and permanent guests therein, and this distinction has a greater significance when we consider that the object and purpose of this law was to furnish housing facilities to dwellers within the city of New York, and not to transients, and to protect such dwellers from oppressive and unreasonable exactions for rent.

It is true that upon the evidence this George Washington had 15 rooms for transients. The remaining rooms were not furnished by the owner of the apartment, but were furnished by the tenants. The logical inference that can be drawn from the provision that the act does not apply to a hotel containing 125 rooms or more is that such a hotel must contain 125 rooms or more for hotel purposes, that is, for use by or in connection with the entertainment of transient guests in accord with the primary meaning of the word "hotel." If a building which was occupied for a hotel contained rooms not fitted up for hotel purposes, such rooms in my judgment should not be included in the number of 125 rooms required in an hotel in order to exempt such building from the provision of the statute. It has been held that an hotel to which persons resort for health and pleasure only, and not for entertainment in the course of a journey, is not an inn. Therefore, an hotel at a watering place is a boarding house, and may reject guests at pleasure. (*Bonner v. Welborn*, 7 Ga. 296; *Southwood v. Myers*, 3 Bush [Ky.], 681; *Kisten v. Hildebrand*, 9 B. Mon. [Ky.] 72.) If the use of these 15 rooms for hotel purposes gives this building the character of an hotel so as to exempt it from the laws of 1920, the use of 10 rooms for hotel purposes would also exempt it. The use of 5 rooms or the use of 2 rooms would exempt it. To hold that the use of any number of rooms for hotel purposes would bring the building within the exemption of the statute, because it had 125 rooms used for other purposes than hotel purposes, would be against all reasonable interpretation of the statute.

If we grant, therefore, that, as to these 15 rooms kept for transients, the George Washington was kept as an inn or hotel within the meaning of the statute, inasmuch as 125 rooms were

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not kept for hotel purposes, the plaintiff does not come within the exception in the statute, and it follows that the determination of the Appellate Term must be affirmed, with costs.

CLARKE, P. J., LAUGHLIN, PAGE and MERRELL, JJ., concur.

Determination affirmed, with costs.

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CARL EMIL MOLLER, and JANE ELIZABETH BLOOMQUIST, as Administratrix, etc., of CHARLES A. BLOOMQUIST, Deceased, Respondents, v. CLARE A. PICKARD and ROLLIN K. MASON, Appellants.

Second Department, May 20, 1921.

**Judgments — conclusiveness and effect — interlocutory judgment establishing right to accounting is binding on referee appointed to state account — attorney and client — purchase by attorney and another with consent of clients who were stockholders of controlling interest in corporation while acting for them — attorney entitled to compensation for service rendered to corporation — he who asks equity must do equity.**

A referee appointed to take and state accounts of the defendants as provided in the interlocutory judgment establishing the right of plaintiffs to an accounting is bound to deal with the case upon the basis of the finding upon which the interlocutory judgment rested.

In an action for an accounting it appeared that one of the defendants, an attorney at law, was engaged by the plaintiffs, who owned a minority interest in a corporation, to render professional aid and that after an investigation he advised that the plaintiffs purchase the controlling interest; that later with the consent of the plaintiffs he induced his codefendant to go into the corporation; that the controlling interest was purchased and held in the name of the two defendants; that the defendants through their management placed the corporation on a firm financial basis; that thereafter the plaintiffs, claiming that the purchase of the stock was for their benefit, demanded that the defendants turn over said stock to them and account for their stewardship; and that the transfer of the stock to the defendants was made with the full knowledge and consent of the plaintiffs.

*Held*, that the defendants were entitled on the accounting to a reasonable compensation for their services rendered in behalf of the corporation during the period of time which they served it prior to the demand by

the plaintiffs, and for a reasonable time thereafter for them to have complied with it.

Since the plaintiffs are asking that the acts of the defendants performed with their consent shall be deemed acts for their benefit, they should, as a condition of being granted that equity, be required to concede to the defendants the equity of allowing them the fair value of their work which inured to the advantage of the plaintiffs.

APPEAL by the defendants, Clare A. Pickard and another, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Chautauqua on the 9th day of September, 1920, on the report of a referee appointed to take and state the accounts of the defendants.

*Frank H. Mott* [*C. A. Pickard* and *H. V. N. Bodine* with him on the brief], for the appellants.

*Robert H. Jackson* [*Benjamin S. Dean* with him on the brief], for the respondents.

MILLS, J.:

This is an appeal to the Appellate Division of the Fourth Department (transferred here for argument and decision) from a final judgment entered upon the report of a referee to state an account, appointed pursuant to a prior interlocutory judgment establishing the right of plaintiffs to an accounting by defendants, which interlocutory judgment had been, on May 4, 1920, unanimously affirmed by that Appellate Division upon the appeal of the defendants. (See 192 App. Div. 943, 949; 195 id. 919, 921; 196 id. 919.)

The interlocutory judgment was entered upon the report of the Hon. Pardon C. Williams as referee, dated September 1, 1919. His decision established the following material facts:

The Monarch Stationery & Paper Company, Inc., was a corporation in the city of Jamestown, N. Y., dealing in stationery supplies. In and prior to 1915 the plaintiffs and one Rogers owned all, or nearly all, of its stock, Rogers owning or controlling a bare majority interest. The concern was not prosperous and difficulties had arisen between the parties. In that situation plaintiffs applied to defendant Pickard, an attorney, for professional aid. After investigation he advised

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that the proper thing to do was to buy out the Rogers interest which, Rogers having then lately died, was held by his estate. Defendant Mason was somehow induced to come into the matter, and finally, on March 28, 1916, an agreement was executed by both plaintiffs authorizing the transfer by the Rogers estate to Mason "and such other parties as he may designate or request" of all the stock owned by it and some other shares, being fifty-one shares and all except the fifty shares owned by the plaintiffs, and, of course, being the majority interest. This consent or waiver was technically necessary, because the by-laws of the corporation prohibited the transfer of any of its stock without the written consent of every other stockholder. Thereafter the defendants purchased and had transferred to themselves all of those other fifty-one shares of the stock. A meeting of the directors was held at once, at which the officers who had represented the Rogers interest all resigned and the defendants were elected in their places — all with the knowledge and participation of the plaintiffs, as Referee Williams subsequently found. Defendants at once assumed the conduct of the corporation and its business, and made a very great success of it. Indeed, the last referee, as a final summary upon this branch of the case, found that when the defendants assumed control of the corporation it was insolvent and its capital stock had no market value; and that under their management the corporation had become solvent and prosperous, having a net value of at least \$20,000. Nevertheless, after a time difficulties arose between the parties herein, and on May 11, 1917, the plaintiffs first formally demanded that defendants turn over to them their stock, apparently upon the theory that their purchase had been made for the plaintiffs' benefit. That demand was not complied with, and this action was commenced on July 11, 1917, upon the same theory or contention.

Referee Williams found, in effect, that defendant Pickard was acting as plaintiffs' attorney, and that Mason well knew that relationship; and that, therefore, the plaintiffs were entitled to have had their demand granted — in other words, to have the defendants held as trustees of the stock for the plaintiffs' benefit. He failed to find that either defendant was guilty of any actual fraud, and distinctly refused to find

any such fact. His decision was evidently to the effect that, in view of the relation of Pickard to the plaintiffs as their attorney and of Mason's knowledge thereof, the plaintiffs had the right to elect to treat the purchase made by defendants of the subject-matter of Pickard's professional employment as the plaintiffs' own. Upon that basis he decided, and the interlocutory judgment adjudged, that defendants must account to plaintiffs for all that they had received by said purchase originally or thereafter, and turn over to the plaintiffs all such property and all income therefrom "upon payment by plaintiffs of such sums, if any, as may be found due defendants for purchase price or other proper charges." After the affirmance of that judgment, the order of reference was entered, directing the referee, Mr. Thrasher, "to take and state the accounts of the defendants \* \* \* as provided in the interlocutory judgment." That referee's decision and report disallowed to the defendants the salaries which they had received as officers of the corporation, aggregating \$5,600, and directed them to pay that sum over to the plaintiffs; and also disallowed to the defendants any compensation whatever for their services, although he found as above stated in effect that their services had been very valuable. Upon the accounting before him, defendants claimed not only to be allowed to retain those salaries, but also to be awarded \$10,000 as additional compensation for their services. At the conclusion of the trial before the last referee, the parties stipulated to leave to him the determination of the value of those services, that is, without bringing in any expert testimony, if he should determine as matter of law that defendants were entitled to any compensation. His opinion indicates that he refused to allow either defendant any compensation because he concluded that each fell within the condemnation of the long line of authorities, many of which he cited, to the effect that, where an attorney has acted in any substantial manner against the interests of his client and to promote his own personal interest, he is entitled to no compensation, although his services may really have been of great value to the client. The foundation of this doctrine doubtless is the ancient maxim that one cannot serve two masters. The referee held even that the rule went so far as to deny to Pickard compensation for his initial services,

meaning as I understand those rendered prior to his refusal to turn the stock over to plaintiffs upon their demand. He based this conclusion upon an extract which he quoted from *Trist v. Child* (88 U. S. 441), viz.: "We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together." I cannot agree that the rule of that extract applies to this case, as I can perceive no difficulty in separating the services of the defendants prior to their refusal of plaintiffs' written demand from those after that date. Obviously they were not so "blended and confused" as that the "bad" (those following the refusal) destroy "that which is good" (those before), "and they perish together." There can, I conclude upon both records, be no doubt that both defendants took the Rogers stock in their individual names originally and assumed the control of the corporation, which the ownership of that stock nominally gave, with the full knowledge and consent of the plaintiffs.

Respondents' counsel calls attention to the fact that in the above recited waiver, which defendant Pickard drew, only the name of defendant Mason as a proposed purchaser is given, and not at all that of Pickard. He urges that omission as evidence that Pickard, the lawyer, was acting in bad faith towards his clients, at least leaving them to suppose that he had no personal interest in the matter, but to aid them had procured Mason, who was not a lawyer, to finance the matter so as to give the plaintiffs a chance to save their investment. However that may be, it is certain that right away thereafter, when the stock was actually transferred, the plaintiffs became advised that some of it was transferred to Pickard personally. Had it all been transferred to Mason alone, and Pickard really had no personal interest in that stock, plaintiffs would have been without any remedy, as it is only because some of it was transferred to Pickard personally that they succeeded in obtaining the interlocutory judgment.

While, no doubt, the general rule is as stated by the learned referee in his opinion, where bad faith on the part of the



attorney throughout the transaction is proven; yet I think that that drastic rule should not be applied here. The finding of Referee Williams, sustained on the prior appeal, to the effect that the original taking by Pickard of a part of the stock in his own name was effected with the knowledge and consent of the plaintiffs, was binding upon the last referee on the accounting. He was acting under the warrant and limitations of that judgment, and was bound to deal with the case upon the basis of the findings upon which that judgment rested. Upon that basis I think that the case before him was one where the maxim "He who asks equity must do equity" applied. The plaintiffs are asking the equity that the acts of the defendants performed with their consent shall be deemed acts for their benefit, and they should, as a condition of being granted that equity, be required to concede to the defendants the equity of allowing them the fair value of their work which thus will be made to inure to the very great advantage of the plaintiffs. When the defendants took hold of the matter, the investment of the plaintiffs in the corporation was practically a dead loss, as the corporation was substantially bankrupt. Defendants' efforts which deservedly have received the commendation of both referees saved the property and made plaintiffs' original shares worth about \$200 each from a mere nominal value. Common justice would seem to require that, if plaintiffs are permitted to treat defendants as merely their agents and so to avail themselves of the fruits of their labors, they, the plaintiffs, should be required to pay them the fair value of their services. It seems to me, moreover, that that is the real intent of the interlocutory judgment in its provision that defendants are to be allowed not only the purchase price which they paid for the stock, but "other proper charges." It is not apparent what else could have been meant by that phrase. The decision of the referee allowing the defendants nothing at all for their very valuable services offends one's natural sense of equity and justice. Of course, we are bound here by the interlocutory judgment which, having been affirmed upon the prior appeal, is not before us for review; and perhaps it may be inept for me to say that the record is such that, had Referee Williams decided contrariwise to what he did upon the vital issue whether or not the defendants originally

purchased with the full consent of the plaintiffs that the purchase should be for defendants' sole benefit, his decision would have been sustained upon appeal. Indeed, it may be noted that upon that trial the evidence showed and the referee found that in the inception of the matter the plaintiffs even asked Pickard to become personally interested in the purchase of the Rogers stock, but that he then refused. It also established that in the preliminary agreement of January 10, 1916, authorizing or inviting Mason to purchase, the plaintiffs declared that they "are anxious to induce the purchase" of the Rogers stock "by some satisfactory person," and agreed that if Mason purchased he should have full control of the corporation and its business. It is not apparent why such an agreement between the very parties should not have fully expressed their real meaning. However all this may be, I am convinced that defendants should be allowed a fair compensation for their services up to the time of the written demand upon them, and for a reasonable time thereafter for them to have complied with it.

Respondents' counsel contends that presumptively at the most the fair value of defendants' services did not exceed the salaries which they, in effect, paid themselves, and that the claim of \$10,000 additional is extreme. That may be true in both respects. It is to be regretted that the learned referee did not fix the value of those services, especially as all parties had exhibited such confidence in him as to stipulate that he might determine that value upon his own judgment without the aid of expert testimony. Had he done so we might modify by allowing the defendants the amounts so determined by him.

Under all the circumstances I think that we may well give to the plaintiffs the option of having defendants' compensation fixed here at the amount of their salaries.

I advise, therefore, that the judgment appealed from be reversed and a new trial of the accounting issues granted before the court at Special Term, or a new referee to be there appointed, with costs to abide the event, unless plaintiffs shall stipulate to permit that judgment to be modified so as to allow defendants to retain the salaries which they have received, and that, in the event of such stipulation being made

within twenty days, the judgment as so modified be affirmed, without costs.

BLACKMAR, P. J., RICH, PUTNAM and JAYCOX, JJ., concur.

Judgment reversed and new trial of the accounting issues granted before the court at Special Term, or a new referee to be there appointed, with costs to abide the event, unless plaintiffs shall stipulate to permit that judgment to be modified so as to allow defendants to retain the salaries which they have received, and that, in the event of such stipulation being made within twenty days, the judgment as so modified is unanimously affirmed, without costs.

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THOMAS A. McKENNEL, Respondent, v. JOHN BARTON PAYNE, Director General of Railroads, as Agent under Section 206 of the Transportation Act of 1920,\* Defendant, Impleaded with ANNA AHEARN McDERMOTT, Individually and as Administratrix, etc., of EDWARD AHEARN, Deceased, Appellant.

Second Department, May 20, 1921.

**Attorney and client — action to foreclose attorney's lien arising under New Jersey statute for contingent fee in negligence action — defendant upon settlement of negligence action conclusively presumed to have retained sufficient to cover attorney's fee — jurisdiction acquired of non-resident client, against whom no personal claim made by service by publication — action one in rem.**

A defendant in a negligence action who settles with the plaintiff therein is conclusively presumed to have retained in its actual possession enough of the settlement fund to meet and discharge a statutory lien of the plaintiff's attorney for a contingent fee.

In an action to foreclose an attorney's lien arising under a New Jersey statute in which it must be presumed that in the settlement by his client of a claim against a third party said third party retained sufficient money to cover the attorney's contingent fee, and that said fund is within this State, and in which it appears that the party holding the same was served

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\* See 41 U. S. Stat. at Large, 461, § 206; Pres. Proc. March 11, 1920, and May 14, 1920; 41 U. S. Stat. at Large, 1789; Id. 1794.—[REP.]

personally within this State, jurisdiction is acquired of the client, a non-resident, against whom no personal claim is made, by service of the summons by publication.

The action is one affecting specific personal property within the jurisdiction and control of the court and is, therefore, an action *in rem*.

APPEAL by the defendant, Anna Ahearn McDermott, individually and as administratrix, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 9th day of March, 1921, denying defendant's motion to vacate and set aside a prior *ex parte* order, directing the service of the summons herein upon her by publication, she being a resident of the State of New Jersey, and to declare such attempted service to be null and void.

*Peter C. Mann*, for the appellant.

*Sydney A. Syme*, for the respondent.

MILLS, J.:

This action was brought by the plaintiff, a New York lawyer, to foreclose his alleged lien upon the settlement by the defendant, the United States Director General, operating the Lehigh Valley railroad, of the cause of action of the said appellant as administratrix, etc., to recover damages for the death of her husband, killed in Jersey City while in the service of defendant's predecessor in the operation of said railroad, his death being alleged to have been caused by the negligence of defendant's said predecessor in that operation. The complaint in this action, in addition to the above-recited facts, further alleges, (a) that the said McDermott as such administratrix retained the plaintiff to take and prosecute legal proceedings against the Director General to recover such damages, and agreed to pay the plaintiff for his such services one-third of any amount that might be recovered by settlement or verdict or judgment; (b) that under that retainer plaintiff brought in her name as such administratrix an action against said Director General in the United States District Court for the District of New Jersey to recover the sum of \$100,000, and that the said Director General appeared in said action and made and filed his answer therein; (c) that thereafter, on or about May 1, 1920, he settled said action with her by paying her the sum

of \$15,000 without plaintiff's knowledge or consent; (d) that at all said times there was in force in New Jersey a statute giving the plaintiff a lien upon said cause of action and any settlement thereof for his services, such statute being set forth in full and being in all substantial respects like the corresponding New York statute;\* (e) that defendant McDermott has refused to pay plaintiff, and that she has no property, real or personal, in this State, and is without means and is a non-resident; and (f) that she has or claims some interest in the fund of \$5,000 which the plaintiff claims the other defendant holds subject to his said lien. Judgment, therefore, is demanded in the complaint that plaintiff has such lien and that the defendant McDermott be foreclosed of all right or interest in the sum thereof, and that the other defendant be decreed to pay the amount thereof, \$5,000, over to the plaintiff. No personal judgment, however, against the appellant is asked.

The moving affidavits, upon which the original order for service by publication was made, served only to emphasize the fact that the appellant is a resident of New Jersey, and has been such continuously for the last twenty-five years, and cannot be served personally within this State. Summons and complaint herein were duly served upon the other defendant personally within this State on February 14, 1921.

The contentions of the appellant here are, and at the Special Term upon the motion to vacate were, (a) that this court has no jurisdiction of the action, as the cause thereof arose entirely in New Jersey and the settlement was made there; and (b) that it has no jurisdiction over the appellant and could acquire none by service by publication. The latter point appears to be the real one involved.

The law of the matter was, quite recently (March, 1921), clearly expressed by the Court of Appeals in its decision and opinion (written by HISCOCK, Ch. J.) in *Hanna v. Stedman* (230 N. Y. 326). In that case a fraternal beneficiary association, having at all times its principal office in this State, was by the recent death of one of its members indebted to someone in the sum of \$1,000, the stipulated benefit. Under the circum-

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\* See N. J. Laws of 1914, p. 410; chap. 201; Comp. Stat. N. J. Supp. 1911-1915, p. 898, § 6; Judiciary Law, § 475.—[REP.]

stances there were two claimants, or sets of claimants. The member, at his death, was a citizen of Maryland, and his widow had died after him, a resident also of that State, and her estate was being administered there. Her representatives, who resided there and were appointed by the proper Maryland court, constituted one set of claimants; and a son, who was a resident of this State, was a rival claimant. The association thereupon brought an action in this State in the nature of an interpleader, making all of the claimants parties, but served the Maryland defendants by publication only. They did not appear in the action and judgment therein went in favor of the son, and the association paid the amount over to him accordingly. Thereafter the Maryland representatives of the widow's estate brought action in the Maryland court against the association, which pleaded the New York judgment in bar; but the Maryland court held that that judgment was no bar to the Maryland people as the service upon them by publication had conferred no jurisdiction upon the New York court against them. Later action in this State was commenced upon the Maryland judgment in favor of the claimants there, and the association in that action pleaded the New York judgment in bar. Therefore, the question was clearly presented for our courts to determine whether or not the New York court in the original action had obtained jurisdiction over the Maryland people. Our Court of Appeals unanimously held that it had not; in other words, that the order for service by publication upon the Maryland people was a nullity; and it reversed the judgment of the lower courts in favor of the defendant association and gave judgment to the plaintiff therein for the full amount. The opinion declares that, had the original action of interpleader been one "*in rem* or one affecting specific personal property," there could have properly been such service by publication; but that in fact and law the action was not of that character but was merely one to establish a personal claim, that is, a mere debt. The opinion (at p. 335) defines an action *in rem* thus: "An action or proceeding *in rem* has for its subject specific property which is within the jurisdiction and control of the court to which application for relief is made. The action proceeds against such specific property and its object is to have the court define

the rights therein of various and conflicting claimants. Jurisdictional control of the property affords the basis for service beyond its jurisdiction upon those who may be interested in its disposition. The result of such an action is a judgment which operates upon the property and which has no element of personal claim or personal liability."

Upon the argument, being at least in a general way advised of this definition or rule, I was much impressed that that test would negative this action for the reason that the alleged fund, viz., the \$15,000 of the settlement, was by the complaint alleged to have been actually paid over to the appellant, and, therefore, of necessity could not be in the possession of the other defendant when the action was commenced; and that, therefore, the action should be deemed one in equity to charge the Director General with the amount of plaintiff's lien, upon the theory that he, in violation of plaintiff's right, had paid the entire fund over to the defendant McDermott; and that, therefore, the action was really one to enforce against the Director General a personal liability. This means that I was disposed to regard the case as practically like the *Hanna Case* (*supra*). However, I find that, as claimed by the learned counsel for respondent here, it has been held clearly by our courts in this State that under such circumstances and in such an action the defendant company (here the Director General) must conclusively be presumed to have retained in its actual possession enough of the settlement fund to meet and discharge the lien. (*Sargent v. McLeod*, 209 N. Y. 360, 365; *Oishei v. Pennsylvania Railroad Co.*, 117 App. Div. 110, 114; *affd.*, without opinion, 191 N. Y. 544.) The latter case was precisely like this, except that, while the accident happened in the State of New Jersey, the original action was brought in this State, and presumptively the settlement made therein. I cannot conceive that that makes any difference. This action as brought is clearly one *in rem*, and no personal judgment against the appellant is asked. It seems to me that, if it must be conclusively presumed that the defendant, the Director General, has actually retained and still has in his possession the identical \$5,000 upon which the plaintiff claims a lien, plaintiff may maintain his action in this State to foreclose his lien upon that fund as "one affecting specific per-

sonal property," "which is within the jurisdiction and control of the court," as being in the actual possession of the defendant, the Director General; and that by personal service upon him such property is brought within the jurisdiction and control of this court. It seems to me that it can make no difference that the right to the lien herein arises under the New Jersey statute instead of under our own, the two being substantially the same. The controlling point is that the fund upon which the lien is asserted appears in the eye of the law to be here, although in fact we well know that it is not. This appears to be a case where the doctrine or convenience of a legal fiction still survives.

Of course, in this case the question of the reasonableness of the amount claimed by plaintiff against an estate has not yet arisen.

Therefore, I advise that the order appealed from be affirmed, with ten dollars costs and disbursements.

BLACKMAR, P. J., PUTNAM, KELLY and JAYCOX, JJ., concur.

Order affirmed, with ten dollars costs and disbursements.

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LIONDALE MERCANTILE CO., INC., Respondent, v. HENRY B. GERBER, Appellant.

First Department, May 27, 1921.

**Sales — action to recover on acceptance of time draft given for purchase of goods to be delivered — evidence examined — question for jury as to breach of contract and waiver — contract construed not to require buyer to call for goods at seller's place of business — seller could not dispose of part of goods before draft due and recover as for full performance — exception to refusal to dismiss complaint at close of plaintiff's case not available on appeal where motion not renewed at close of evidence.**

In an action to recover upon the acceptance by the defendant of a time draft which recited that the obligation of the acceptor arose out of the purchase of goods from the plaintiff, in which it appeared that the contract for the purchase of the goods provided for "Delivery at New York: When called for," and that the price was "f. o. b. New York," evidence examined, and held, that a question of fact was presented as to whether the defendant refused to take the goods and if so whether that refusal was



not waived and whether when he demanded the delivery of a part of the goods he consented that delivery might be deferred until it would be convenient for the plaintiff to make it, and whether the plaintiff's failure to make the delivery was not owing to the defendant's refusal to comply with plaintiff's unwarranted demand for cash payment to apply on the contract.

It was error to direct a verdict for the plaintiff on the theory that there was no obligation on the part of the plaintiff to deliver any of the goods until the defendant called at its place of business, and was prepared to receive delivery thereof, for the reasonable construction of the contract is that the defendant had the option to designate the place of delivery within the city, whether to himself at his place of business or to a carrier for transportation elsewhere, or otherwise, and the words "When called for" were intended to obligate the seller to hold the goods till the defendant desired delivery thereof and gave it notice of the place, and the defendant was not obliged to call for the goods at the plaintiff's place of business.

The action being between the parties to the acceptance and the acceptance having been expressly predicated on the contract, the case is the same in principle as an action by a seller for the purchase price of goods, and it seems that the plaintiff did not have the right to dispose of part of the goods sold to the defendant before the draft became due and recover on the contract as for full performance of its obligations thereunder.

However, while the defendant moved for a dismissal of the complaint at the close of the plaintiff's case and excepted to a denial of his motion, he did not renew the motion at the close of the evidence and, therefore, the exception is no longer available and cannot be made the basis of a decision by the Appellate Division.

APPEAL by the defendant, Henry B. Gerber, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 8th day of January, 1921, on the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 12th day of January, 1921, denying the defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*Morris Grossman*, attorney, [*Leopold Klinger* of counsel], for the appellant.

*Henry Swartz*, for the respondent.

LAUGHLIN, J.:

The recovery was upon the acceptance by the defendant at the city of New York of a time draft, referred to as a trade

acceptance, drawn at the same place by the plaintiff on the 9th of April, 1920. By the acceptance the defendant promised to pay to the order of the plaintiff on the 11th day of July, 1920, \$4,460.95. It was recited in the draft that the obligation of the acceptor arose out of the purchase of goods from the drawer. The answer put in issue the material allegations of the complaint and for a first defense alleged that the acceptance was given in advance as part performance of a proposed contract by which plaintiff agreed to sell to the defendant and he agreed to buy of it ten cases of voile to be delivered when called for, and that on the 21st of June, 1920, he called for and demanded delivery of one case of the goods and delivery thereof was refused, and that plaintiff failed to tender delivery of the goods and defendant elected to rescind the contract and notified the plaintiff of such election, and that, therefore, the acceptance was without consideration and void. The second defense repeats, by reference, the allegations of the first and further alleges that by the terms of the contract the defendant's liability, if any, was limited to \$1,000. The answer also contains a counterclaim in which the allegations of the first defense are repeated, by reference, and it is alleged that the defendant deposited with the plaintiff \$1,000 as security for the performance of the agreement by him and to be forfeited in the event that he failed to accept the goods, and that he was at all times ready, willing and able to accept and pay for the goods and would have done so if the plaintiff had tendered performance, and that the return of the amount so deposited as security has been demanded and refused, and judgment is demanded therefor and for the dismissal of the complaint. The reply to the counterclaim admits that the acceptance was to be payment in part for the ten cases of goods and that the defendant requested the delivery of one case on the twenty-second of June, and puts in issue the other allegations of the counterclaim; and for a defense to the counterclaim it is alleged in the reply that the original contract was modified by providing that the defendant should deliver in advance a trade acceptance covering all the goods, and that this was done, and that thereafter the defendant repudiated the agreement and refused to pay according to his acceptance and subsequently requested the plaintiff to deliver part of the

goods, which the plaintiff agreed to do as soon as it conveniently could, and that it tendered delivery thereof on the ninth of July, but that acceptance of delivery was refused, and that the plaintiff has been ready and willing at all times to perform the agreement as modified and offered so to do, but the defendant repudiated it.

The agreement for the sale of the goods was made in writing on the 24th day of March, 1920. It recites that the defendant placed the order for the goods with the plaintiff, and with respect to delivery it provides as follows: "Delivery at New York: When called for." Below this line of the contract were three headings, "Pieces," "Description," "Price per yard," and below the latter and between it and the price per yard was the following: "f. o. b. New York." It was shown that the contract was on "a form," but it does not appear whether it was a printed or typewritten or written form, or what part was filled in to make this contract. It provides that the plaintiff was to receive at once the defendant's check for \$1,000 "as security on this transaction which amount is to be forfeited" by the defendant if he failed to accept the goods. It also provided that the goods were to be billed to the defendant and that payment of the bill was to be guaranteed by a bank. It further provides that if the delivery of any of the goods was deferred at the request of the buyer, delivery thereof might be made at the seller's option after the expiration of the specified time, and that shipments within two weeks after the specified date for delivery should constitute good delivery, and that "All goods are sold at New York, at mill, at finishing works, according to point of origin," and that "delivery of the merchandise to a transportation carrier constitutes a delivery," and that if the transportation company for any reason refuses to accept the merchandise, the seller has the privilege of at once charging the goods to the buyer and holding them subject to his order, and the buyer was requested carefully to examine and test all goods before using them as no allowance would be made after the goods were cut. On the sixth of April the plaintiff wrote the defendant stating that at his request it inclosed a bill covering merchandise that it was holding for him and that it would be pleased to hear from him with trade acceptance properly

signed. There is in the record an invoice dated "March 29, as May 1, 1920," which was inclosed with the letter. It specifies by number ten cases and the yardage in each. On the ninth of April the plaintiff wrote the defendant waiving, as had been agreed verbally, the provision that the bill was to be guaranteed by a bank and agreeing instead to hold his check for \$1,000 given as security which he was to forfeit in the event that he did not take the goods, and agreeing "to release \$3,000 worth of merchandise at one time against trade acceptance" which, it is recited, the defendant was giving the plaintiff "for this entire transaction," and agreeing to hold the balance of the shipment until the payment of the first \$3,000, and then to make a further shipment of \$3,000 and to repeat that "until the entire transaction has been disposed of." It will be noted that the acceptance bears the same date as this letter. On the twenty-first of June the defendant wrote the plaintiff to ship to the Elk Textile Co., Inc., at a specified address for his account one case of the goods he had on order with it and to charge and mail the bill to him. On the twenty-eighth of June he wrote the plaintiff again drawing its attention to his former letter and to the fact that he had received no reply thereto and that the goods had not been shipped and requesting delivery at once, and to charge and mail the invoice to him. On the thirtieth of June the plaintiff wrote to the defendant referring to his letter of June twenty-eighth and stating that it had explained the situation quite fully to him over the telephone and that it was "laboring under great difficulties in making delivery of the merchandise at present," but that it probably would be in a position to do something for him in a few days. On the eighth of July, which was three days before the draft became due, the defendant wrote the plaintiff that owing to its failure to deliver the case of goods his customer had canceled the order and that, therefore, he was compelled to cancel his order with the plaintiff, and he thereby gave it notice of such cancellation, and requested the return of the deposit. The plaintiff next day notified defendant that his customer had refused a tender of delivery of the case of goods, and on the thirteenth of July it wrote him refusing to accept the cancellation of the order and stating that it had explained to him its

difficulty in making deliveries and that it would deliver at the first opportune time and that this agreement was agreeable to him and that it had made the shipment to his customer and had tendered the delivery of the goods on July ninth, and delivery was refused, as it had notified him, and that under the circumstances it could not accept his cancellation and would expect him to "take care of this transaction."

The plaintiff showed that it indorsed the acceptance in blank and caused it to be presented for payment on July eleventh and to be protested for non-payment. The plaintiff's vice-president and manager testified that he thereafter asked the defendant why he did not pay the acceptance, and the defendant replied, in substance, that he had told him before he would not pay it and that he did not take the goods and that he would not take them; that at the time the contract was made the plaintiff had the goods in storage, and that it took the goods from the storehouse early in July and some of them were taken out before that date; that the invoice, to which reference has been made, represented the identical goods which were sold to the defendant and which were to be delivered to him; that after receiving the defendant's request for the delivery of one case of the goods on June twenty-first, he endeavored to communicate with the defendant by telephone and called at his office, but it was closed, and that he then wrote the defendant to come and see him, and that after receiving the defendant's second letter requesting delivery of the one case of goods the plaintiff on the ninth of July sent the case of goods by hand truck to the defendant's customer who refused to receive it; but he said that this was at the request of the defendant, made early in July, who said that he could not get a truckman and that he at that time offered to give the defendant a delivery order on the storage house for the case of goods; that when these requests for the delivery of the one case of goods were made, the plaintiff had the ten cases on hand, either in its place of business or in storage. An invoice of six cases of this quality of goods, including one of the cases sold to the defendant, purporting to be a sale of the goods by the plaintiff to another firm on the 29th of April, 1920, was received in evidence, and it was shown by uncontroverted evidence that the goods were delivered according to that

invoice the latter part of March or early in April. The plaintiff objected to that evidence showing a sale and delivery to another of one of the cases of goods sold to defendant on the ground that there was no defense predicated on a sale of part of the goods by the plaintiff to another pleaded; but on the defendant's contention that it was admissible under its defense that the plaintiff breached the contract and failed to deliver or tender delivery of the goods thereunder the court overruled the objection. It was also shown that the plaintiff retained the other goods sold to defendant and covered by the invoice until about three months before the trial when the plaintiff was in liquidation and the goods evidently were sold although definite proof of such sale was excluded on plaintiff's objection. The plaintiff claimed that this evidence was inadmissible since the defendant did not counterclaim for damages, but the defendant claimed it showed that the plaintiff accepted the defendant's attempted cancellation, and that otherwise it would have been the duty of the plaintiff to hold the goods or to tender delivery thereof to the defendant and to rely upon the three trade acceptances, the other two being like the one sued upon, covering the purchase price of all the goods, and that where, as here, the plaintiff sues upon a trade acceptance representing the purchase price of part of the goods, it was its duty to remain able to deliver the merchandise. The defendant also claimed that the plaintiff having sold part of the goods before the draft fell due was unable to perform the contract, and, therefore, could not recover on the acceptance.

The vice-president and manager of the plaintiff testified that early in June the defendant told him that he could not take and pay for the goods, and that as a result of negotiations the plaintiff offered to allow a deduction from the purchase price of two and one-half cents, which represented its profits, and that defendant endeavored but was unable to obtain the money to pay therefor, and then stated that he would not take the goods, and that after that the plaintiff received the defendant's order to deliver the one case of goods, and that although plaintiff wrote defendant on June twenty-sixth and twenty-eighth asking him to call with respect thereto, he failed so to do, and then they had a conversation over the

telephone, as already stated, and in that conversation there was no reference to the prior interview or negotiations between them, and that defendant requested the delivery of the goods then or as soon as plaintiff could deliver them, and that at the time the plaintiff tendered delivery of the one case it considered the original contract in force. The witness further testified that at the time the contract was made the plaintiff had twenty or twenty-five cases of the same kind of goods and that one of the cases invoiced to the defendant was sold to another through error, but that the plaintiff then retained on hand and in storage some twenty cases of the same kind of goods and that the reason he did not deliver the case of goods before July ninth was "I didn't have to deliver it."

The defendant testified that during the negotiations and at the time the contract was signed there was a conversation between him and the plaintiff's representative Halperin with regard to "delivery when called for," and that he said that March was no time for the delivery of voiles and that he wanted the goods sometime between May and July, and that Halperin replied, "All right, you can have them dated as May 1st, and have them delivered to you any time," and that he asked if Halperin would have that put on the order, to which Halperin replied, "Yes, you can have them delivered to you any time between May 1st and July, any time you call for them." This testimony was stricken out on plaintiff's motion as varying the terms of the contract and the defendant excepted. The defendant testified that he called for the goods by requesting by letter as shown the delivery of part of them. He denied that he had the conversation with Halperin early in June, as the latter testified, or that he asked to be relieved of the contract, and further testified that after receiving the plaintiff's request of June twenty-sixth to call, he telephoned and talked with Halperin and asked what was desired, and Halperin answered that he wished to see him about the goods that he had ordered, and he being unable to leave the office Halperin came over to see him, and he informed Halperin that he had sold all the goods to this customer and that the customer wanted one case then for samples, and that Halperin refused to deliver the goods without the payment of more money; that he then drew Halperin's attention to the contract by

which he was to receive credit to the extent of \$3,000 on the acceptances, which arrangement was based on a financial statement he had rendered to the plaintiff showing that he had in cash and merchandise \$28,000, and also his attention to the fact that his deposit of \$1,000 would more than cover the one case of goods, and insisted on the delivery of the goods without a cash payment, but Halperin said he would not ship the goods and that he showed Halperin the contract with his customer by which he was to receive a profit of one and one-half per cent over the purchase price. The defendant also showed that before he canceled the contract the plaintiff had opened several of the cases of goods sold to him and removed goods therefrom, and that the cases of his goods which plaintiff had at the time he canceled the contract which had been opened did not contain the yardage called for by the invoices and that on the seventh of July his customer canceled the order for the purchase from him of these goods on account of the non-delivery of the case he had directed the plaintiff to deliver.

It thus appears that on the conflicting testimony a question of fact was presented as to whether the defendant early in June refused to take the goods and if so whether that refusal was not waived and whether when he demanded the delivery of one case of goods the latter part of June he consented that the delivery might be deferred until it would be convenient for the plaintiff to make it, and whether the plaintiff's failure to make the delivery was not owing to defendant's refusal to comply with its unwarranted demand for a cash payment to apply on the contract.

At the close of the evidence the court directed a verdict for the plaintiff for the amount of the acceptance less the \$1,000 deposited by the defendant as security, and dismissed the counterclaim. The defendant excepted and asked leave to go to the jury on all the questions of fact and particularly as to the meaning of the words, "When called for," with respect to the delivery of the goods, and as to what was intended as to the forfeiture of the deposit. The request was denied and the defendant excepted, and his motion for a new trial was also denied.



The verdict was directed on the theory that there was no obligation on the part of the plaintiff to deliver any of the goods until the defendant called at its place of business and was there prepared to receive delivery thereof. I am of opinion that the court erred in so ruling. The place of business of both parties was in the city of New York. If it had been intended that delivery was to be made at plaintiff's place of business or at the warehouse in which the goods were stored, I think that would have been shown more definitely by the contract. The terms used in the contract are those commonly employed where the seller is to deliver the goods when ordered by the purchaser. The delivery was necessarily to be made by the seller; the contract provides that it was to be made at New York "When called for," and also that the goods were to be delivered "f. o. b. New York." The latter provision would be wholly unnecessary and inappropriate unless it was intended that the seller was to do carting at its own expense incident to the delivery of the goods, for it expressly provided that delivery was to be made at New York where the places of business of both parties were and, therefore, the abbreviations "f. o. b." could not have been here used, as it sometimes is, where the buyer and the seller are at different points, to fix the purchase price by indicating that the purchaser is to pay the freight. (*Miller & Sons Co. v. Sergeant Co.*, 191 App. Div. 814, 818; *Maddaloni Olive Oil Co., Inc., v. Aquino*, Id. 51, 55.) The reasonable construction of these provisions with respect to the place of delivery is, I think, that the buyer had the option to designate the place of delivery within the city, whether to himself at his place of business or to a carrier for transportation elsewhere or otherwise, and the words "When called for" were intended to obligate the seller to hold the goods until the defendant desired delivery thereof and gave it notice of the place he desired delivery to be made. Doubtless if defendant did not call for the goods within a reasonable time the plaintiff could have tendered delivery and could have sued for and recovered the purchase price provided it held the goods subject to the order of the defendant.

The construction that defendant was not required to call for and take the goods is further borne out by the provisions

of the contract referring to delivery to a transportation carrier and prescribing the rights of the seller in the event that such carrier should for any reason refuse to accept the goods. If this construction may not be given as a matter of law, it surely may not be held as a matter of law, as the trial court ruled, that there was no obligation on the part of the seller with respect to delivery until the defendant came prepared to take and receive the goods, and the parol evidence received and stricken out was admissible to aid in the construction of these provisions.

There is, I think, another serious obstacle to the plaintiff's right to recover. The action being between the parties to the acceptance and the acceptance having been expressly predicated on the contract, the case does not differ in principle from an action by the seller for the purchase price of the goods; and viewed in that light I am unable to see any theory on which the plaintiff could dispose of part of the goods sold to the defendant before the draft became due and recover on the contract as for full performance of its obligations thereunder. The defendant, however, failed to move for a dismissal at the close of the evidence, and although he moved for a dismissal at the close of the plaintiff's case and excepted to the denial of his motion, having failed to renew it at the close of the evidence, the exception is no longer available and may not be made the basis of decision by an appellate court. (*Hopkins v. Clark*, 158 N. Y. 299; *Clements v. Beale*, 53 App. Div. 416.) This point, therefore, is not presented for decision.

It follows that the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CITY  
OF NEW YORK, Respondent, v. QUEENS COUNTY WATER  
COMPANY, Appellant.

Second Department, June 3, 1921.

**Mandamus** — application by city of New York for peremptory mandamus to compel extension of water system for fire protection — writ denied where city's liability for compensation doubtful — alternative writ directed.

An application by the city of New York for a peremptory writ of mandamus to compel the defendant to install certain fire hydrants and to extend its line in compliance with executive orders of the municipal commissioner of water supply was improperly granted, since under the terms of the Greater New York charter, the power of the commissioner alone to contract and the obligation to pay for the new structural additions are in doubt, and, therefore, an alternative writ should have been directed. MILLS, J., dissents.

APPEAL by the defendant, the Queens County Water Company, from an order of the Supreme Court, made at the Kings Special Term and entered in the office of the clerk of the county of Queens on the 3d day of December, 1920, granting relator's application for the issuance of a peremptory writ of mandamus to compel the Queens County Water Company to install forthwith at its own expense twenty-three new fire hydrants (also a new six-inch main in Bay Seventeenth street, for a distance of 100 feet) in the fifth ward of the borough of Queens (Rockaway Peninsula) in and along such public streets, mentioned in said order.

*Henry deForest Baldwin*, for the appellant.

*Elliot S. Benedict* [*John P. O'Brien*, Corporation Counsel, *John F. O'Brien* and *Robert J. Culhane* with him on the brief], for the respondent.

PER CURIAM:

Considering the peculiar situation of the parties, the majority of the court are of the view that a peremptory writ should not at first be issued. A serious difficulty has arisen as to compensation. Therefore, before the respondent should be coerced into obedience of these "executive orders" of the

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Second Department, June, 1921.

municipal commissioner of water supply, defendant should have a hearing regarding such "executive orders," and how far they commit the city for compensation for such new hydrants, and for the additional outlays involved in such a water supply for fire extinguishing purposes. Where liability for compensation is plain, so that the service may be fairly recompensed, such a peremptory writ may be a proper remedy of the municipality. But under the terms of the charter of Greater New York, the power of the commissioner alone to contract, and the obligation to pay for the new structural additions, appear in doubt. Accordingly, instead of a peremptory writ, an alternative writ of mandamus will be directed.

BLACKMAR, P. J., PUTNAM, KELLY and JAYCOX, JJ., concur; MILLS, J., votes to affirm upon the ground that the company has ample remedy under the statute, and a just public policy requires that the execution of the order shall not await the determination of the question of the fairness of the rate.

Order modified so as to direct an alternative writ of mandamus. Settle order on notice.

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SAMUEL FALK, an Infant, by HARRY FALK, His Guardian ad Litem, Respondent, v. ROY H. MACMASTERS and JAMES A. CORCORAN, Trading under the Firm Name and Style of R. H. MACMASTERS & COMPANY, Appellants.

Second Department, June 10, 1921.

**Pleadings — action by infant to recover money deposited for stock margin — demurrer to answer brought on by motion for judgment on pleadings properly denied if any portion of answer is sufficient — denial of knowledge or information as to plaintiff's infancy sufficient against demurrer — effect of confession and avoidance as to denial — frivolous denial not demurrable — defense that plaintiff falsely represented his age is available — defense that complaint does not state facts sufficient to constitute cause of action cannot be taken by answer.**

A demurrer to an answer and to separate defenses which is brought on by a motion for judgment on the pleadings cannot be sustained if any portion of the answer is sufficient.

In an action by an infant to recover money deposited for stock margin a denial of knowledge or information sufficient to form a belief as to the allegations of plaintiff's infancy and the appointment of his guardian *ad litem* are both sufficient to withstand an attack by demurrer.

The defendant's denial of plaintiff's infancy was not waived by the subsequent defense that the plaintiff falsely misrepresented his age, even if such denial admitted in effect that the plaintiff was not of age.

If a denial is frivolous the proper remedy of the plaintiff is to move to strike it out and not to demur thereto.

In an action by an infant to recover money paid by him to stockbrokers for marginal purposes a defense based on the false and fraudulent representations by the infant that he was more than twenty-one years of age is valid, since an infant is responsible for his torts.

The defense that the complaint does not state facts sufficient to constitute a cause of action cannot be taken by answer.

APPEAL by the defendants, Roy H. MacMasters and another, from an order of the Supreme Court, made at the Kings Special Term and entered in the office of the clerk of the county of Kings on the 23d day of March, 1921, granting plaintiff's motion for judgment on the pleadings.

*Theodore F. von Dorn*, for the appellants.

*Benjamin Berinstein*, for the respondent.

JAYCOX, J.:

The court at Special Term granted a motion made by the plaintiff for judgment on the pleadings. The pleadings consist of the complaint, an answer and a demurrer to the answer.

The action is brought to recover moneys deposited by the plaintiff with the defendants to margin certain stock transactions conducted by the defendants, as brokers for the plaintiff, upon the ground that at the time of the deposit and of the transactions the plaintiff was and still is an infant.

The answer denies knowledge or information sufficient to form a belief as to the allegations of the plaintiff's infancy and the appointment of his guardian *ad litem*. For a further answer the defendants allege that they were induced to act as brokers for the plaintiff and to accept his deposit and disburse it under his directions by false and fraudulent representations made by the plaintiff that he was more than twenty-one years of age. The answer further alleges as a separate and distinct defense that the complaint does not

state facts sufficient to constitute a cause of action. It also alleges for a second separate and distinct defense and for a setoff and counterclaim that the plaintiff falsely and fraudulently represented himself to be more than twenty-one years of age and deposited various moneys with the defendants as margin to apply to stock purchases made by the defendants under his direction and that, acting under his direction, the defendants expended and paid out \$570.89 over and above the amount deposited by the plaintiff with them and prays for judgment for this amount.

The plaintiff demurred to the so-called further answer and to the first separate and distinct defense on the ground that they are insufficient in law on the face thereof. The plaintiff also demurred to the defendants' so-called separate and distinct defense and setoff and counterclaim on the ground that the facts stated are not sufficient to constitute a counterclaim and as insufficient in law on the face thereof. The plaintiff did not bring his demurrer on as a motion and thus test the sufficiency of it as applied to any portion of the defendants' answer. On the contrary, his motion was for judgment and, if any portion of the defendants' answer was sufficient, the motion should have been denied.

The denial of the plaintiff's infancy and of the appointment of a guardian are both sufficient to withstand an attack by demurrer. The Code of Civil Procedure, section 500, expressly authorizes a denial of any knowledge or information sufficient to form a belief as to any material allegation of the complaint. The plaintiff seeks to avoid this provision of the Code of Civil Procedure as to the denial of the plaintiff's infancy upon the ground that the defendants state in their further answer and also in their counterclaim that the plaintiff falsely and fraudulently represented that he was more than twenty-one years of age, the contention of the plaintiff being that this is an admission that the plaintiff was under twenty-one years of age at the time of these transactions. I think the answer cannot be thus construed. My attention has been called to no case holding that where a fact is sufficiently denied in one division of the answer to put the plaintiff to his proof, he can treat the denial as waived or proof dispensed with by reason of even an express admission of the fact

contained in a separate defense introducing an avoidance. In fact, I think the authorities are to the contrary, and the defendants' denial is unaffected by a subsequent admission contained in a defense containing an avoidance. (*Troy & Rutland R. R. Co. v. Kerr*, 17 Barb. 581.) It was held in *Goodwin v. Wertheimer* (99 N. Y. 149) that a defendant may put his defense upon distinct and even inconsistent grounds.

The plaintiff says that the denial of information sufficient to form a belief as to the appointment of the guardian *ad litem* of the plaintiff is frivolous. In that he may be correct, but the trouble with that assertion at this time is that he did not move to strike out that denial as frivolous. The plaintiff should have moved to strike out the frivolous defense and then the party moved against would have had an opportunity to prove that the defense presumptively frivolous was, in fact, true. The plaintiff has, therefore, mistaken his remedy in demurring to these denials, and the motion for judgment, so far as based upon them, was improperly granted. (*Harley v. Plant*, 210 N. Y. 405, 411.)

The plaintiff further claims that the allegations of false and fraudulent representations as to the plaintiff's age constitute no defense to the plaintiff's cause of action. The cases, however, cited by the plaintiff do not sustain this contention. In all of the cases cited by the plaintiff the party alleging the false representation as to age has been seeking to recover from the infant defendant on a contract, and it has been held that if an infant were liable under such conditions the entire defense of infancy would be emasculated. It is also held in these and other cases that infancy cannot be used both as a sword and shield — that an infant is liable for his torts. In this case the defense is based upon a claim that the plaintiff, by his false and fraudulent representations, induced the defendants to accept and disburse his moneys and after his moneys had been disbursed in accordance with his direction, upon a plea of infancy he seeks to recover the sum from the persons whom he deceived. I find nothing in the cases cited to support a claim that such a defense cannot be introduced.

*New York Building Loan Company v. Fisher* (23 App. Div. 3) was an action to foreclose a mortgage made by an infant.

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Second Department, June, 1921.

The action being to enforce a contract by the infant, the infant's false representations as to age were held to give no validity to the contract. *Studwell v. Shapter* (54 N. Y. 249) and *International Text Book Co. v. Connelly* (206 id. 188) are also actions brought upon a contract against an infant defendant wherein it is alleged that the defendant made false representations as to his age to induce the plaintiff to enter into the contract. *Mordecai v. Pearl* (63 Hun, 553) holds that an infant who deposited money with stockbrokers as a margin, upon the credit of which he engaged in stock speculations which resulted in a loss, may recover his deposit in full. There is, however, in this case no claim of any false representations by the plaintiff. In *Heath v. Mahoney* (7 Hun, 100) the plaintiff's stockbrokers sought to recover damages which they claimed to have suffered by reason of false and fraudulent representations made by the infant defendant. The infant defendant deposited with them \$500 in cash and two United States bonds of \$500 each. The defendant's representations consisted of stating that the defendant was the owner of these bonds, although registered in the name of his mother, who subsequently reclaimed them. The trial court permitted the plaintiffs to recover the total amount of their losses by reason of the transactions had with the defendant. Upon appeal the court held that the only damages the plaintiffs were entitled to recover was the amount suffered by reason of the false representations made by the defendant as to the ownership of the two United States bonds. The judgment of the court below was, therefore, reversed and a new trial ordered. This seems to be a distinct holding that an infant is liable for losses arising by reason of his false representations. A number of other cases may be cited holding practically the same thing. (*Shenkein v. Fuhrman*, 80 Misc. Rep. 179; *Lown v. Spoon*, 158 App. Div. 900; *Gaunt v. Taylor*, 15 N. Y. Supp. 589; *Bergman v. Neidhardt*, 37 Misc. Rep. 804; *Hewitt v. Warren*, 10 Hun, 560.) In the last case cited it is said: "If a party has been induced to purchase property from an infant, by the infant's fraud and misrepresentation, it would seem that he might, on discovering the fraud, disaffirm the contract, return, or offer to return the property, and thus put the infant in the position of a mere wrong-doer, unjustly keeping what he



had fraudulently obtained. And it would seem that the infant would then be liable in damages for tort." In this case there is nothing to return. The plaintiff seeks to recover upon a contract which the defendants say was procured by fraud and misrepresentation. There is no reason either in law or good conscience why this defense should not be interposed and, if established, why it should not prevent the plaintiff's recovery.

The defense that the complaint does not state facts sufficient to constitute a cause of action cannot be taken by answer. If the complaint is deficient in its allegations, that defect appears on the face of the complaint and should be taken by demurrer. (See Code Civ. Proc. §§ 488, 498, 499.) This, however, did not benefit the plaintiff upon this motion, as the answer raised issues necessitating the trial. The plaintiff's motion, therefore, should have been denied.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion for judgment denied, with ten dollars costs.

BLACKMAR, P. J., MILLS, RICH and PUTNAM, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion for judgment denied, with ten dollars costs.

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GEORGE B. HEWLETT, Appellant, v. EUGENE VAN VOORHIS and CHARLES VAN VOORHIS, as Executors, etc., of JOHN VAN VOORHIS, Deceased, Respondents, Impleaded with CYRIL J. CURRAN and Others, Defendants.

First Department, June 3, 1921.

**Executors and administrators — actions against — costs may be awarded by Appellate Division on reversal of judgment in favor of executors — Code of Civil Procedure, §§ 1835 and 1836, applied — action unreasonably defended — waiver by executors of certificate of facts by not presenting defense on original settlement of order awarding costs.**

The Appellate Division on the reversal of a judgment against executors in cases where such court has the power to reverse a judgment and make new findings and direct the entry of a judgment in favor of the other

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party, takes the place of the trial court and may decide whether or not the executors unreasonably resisted or neglected to pay plaintiff's claim, and whether or not they should be compelled to pay the costs of the trial individually as provided in sections 1835 and 1836 of the Code of Civil Procedure.

Said sections of the Code do not apply to or preclude an award of costs against executors on an appeal.

Executors unreasonably defend a claim based on a judgment, where it appears that their defense was not on the merits but solely on the theory that the plaintiff lost the benefit of a judgment recovered by default against all of the defendants on a joint liability, upon such judgment being opened as to one of the defendants and the complaint dismissed as against him, and that thereupon the judgment became void and unenforceable as against the other defendants.

The executors by not presenting the aforesaid defense on the original settlement of the order by the Appellate Division awarding costs waived any point with respect to whether a formal certificate of the facts by the Appellate Division is required but did not waive the point that such certificate must be procured from the trial justice.

MOTION for resettlement of order.

*John Van Voorhis' Sons*, for respondents, for the motion.

*Charles H. Stoddard*, for appellant, opposed.

PER CURIAM:

On the trial the complaint was dismissed, with costs, but on appeal by plaintiff this court reversed the judgment and granted final judgment in favor of the plaintiff against the defendants, who are executors, with costs of the appeal and of the trial. (See 196 App. Div. 322.) On the original settlement of the order both parties presented proposed orders so providing for the costs; and no point was raised with respect to our awards of costs. The executors have now moved for a resettlement of the order by striking out the awards of costs, on the grounds that the payment of plaintiff's claim was not unreasonably resisted or neglected by them, and that no certificate was obtained from the justice who presided at the trial authorizing such awards of costs, as provided in sections 1835 and 1836 of the Code of Civil Procedure. The trial court, having decided that the plaintiff was not entitled to recover, could not have made such a certificate on the trial. The sections of the Code to which reference has been made do not apply to or preclude an award

of costs against executors on an appeal. (*Hunt v. Connor*, 17 Abb. Pr. 466; *Matson v. Abbey*, 141 N. Y. 179.) The costs were awarded against the executors in their representative capacities and not personally. In such case it has been held that the executors are not aggrieved and may not appeal. (*Meltzer v. Doll*, 91 N. Y. 365.) That decision and *Demarest v. Smith* (143 App. Div. 104) were not intended to deprive the plaintiff of the right to costs either against the personal representatives personally or in their representative capacities when it became necessary for the plaintiff to bring the action, but in either case the certificate is required. In the instances in which the Appellate Division is authorized to reverse a judgment and make new findings and direct the entry of a judgment in favor of the other party (Code Civ. Proc. § 1317; General Rules of Practice, rule 34), we are of opinion that it takes the place of the trial court; and that on such reversal in the case at bar it was for this court to decide whether or not the executors unreasonably resisted or neglected to pay plaintiff's claim, and whether or not they should be compelled to pay the costs of the trial individually. Our opinion shows that they did unreasonably defend against the claim. Their defense was not on the merits, but solely on the theory that the plaintiff lost the benefit of a judgment recovered by default against all of the defendants on a joint liability, upon such judgment being opened as to one of the defendants and the complaint being dismissed as against him, and that thereupon the judgment became void and unenforcible as against the other defendants. On these grounds, therefore, we deny the motion and hold that the executors, by not presenting the point on the original settlement of the order, waived any point with respect to whether a formal certificate by this court is required, but did not waive the point that such certificate must be procured from the trial justice.

Present — CLARKE, P. J., LAUGHLIN, DOWLING, MERRELL and GREENBAUM, JJ.

Motion for resettlement denied.

In the Matter of EDWARD J. ROSE, an Attorney.

Second Department, June 17, 1921.

**Attorney and client — suspension of attorney for failure to pay over money to client.**

Attorney at law suspended from practice for six months where it appears that he retained money received in settlement of an action instituted by him in favor of his client and that the only claim of right to do so was that he was entitled to a part of said money as a counsel fee.

DISCIPLINARY proceedings instituted by the Brooklyn Bar Association.

*Mortimer W. Byers*, for the motion.

*Edward J. Rose*, in person, opposed.

MANNING, J.:

This is a disciplinary proceeding instituted by the Brooklyn Bar Association against the respondent, who is a practicing lawyer with an office in the borough of Brooklyn. He was admitted to the bar in the year 1912, and since that time has practiced his profession in the borough of Brooklyn. He was charged by the Bar Association with having been "guilty of fraud, deceit, malpractice and of conduct prejudicial to the administration of justice as defined in Section 88 of the Judiciary Law\* of the State of New York," as follows:

"a. During the month of June of 1919, the respondent was the attorney for one John Kerstein, a resident of Springfield, Mass., and brought an action in the Municipal Court of the City of New York, on his behalf to recover damages for injuries sustained by the automobile of the said John Kerstein.

"b. That during the said month of June, 1919, the respondent settled the said action with the consent of his client for the sum of \$175.00. \* \* \*

"d. That although frequently requested to deliver to the said John Kerstein so much of the said \$175.00 as the respondent was not entitled to retain in payment of his services as attorney, the respondent has wholly failed, refused and neglected to pay any part of the said sum to the said John Kerstein."

\* See Judiciary Law, § 88, subd. 2, as amd. by Laws of 1913, chap. 720.  
—[REP.]

The charges against the respondent were duly referred to Hon. Edward B. Thomas, as official referee, who with pains-taking care has written a very complete report regarding the charges made against the respondent; and has also stated very fully the excuses offered by the respondent for his alleged dereliction of duty.

It was the contention of the respondent upon the hearing before the learned official referee that the reason why the money was not paid to his client was that the client refused to carry out an agreement which the respondent said the client made with him, in reference to the amount of the respondent's charges. The substance of the respondent's claim was that out of the \$175 so collected by him, he was justified in retaining the sum of \$100, which he said was the agreed compensation that he was to receive under the arrangement made with his client.

Concerning this alleged agreement, the learned referee says: "His claim for \$100 is not without some plausibility, and had he done nothing more than insist upon the retention of that sum under a claim of right, the present proceeding would not be justified. There is evidence presented by the petitioner tending to show that he agreed to do the work for a less sum, but in view of some correspondence such evidence is not probative of misconduct on the part of Rose, nor in itself does it indicate unprofessional conduct." And the referee further says: "Rose's fault, as I now consider it, is not that he retained \$100, but rather that he impounded the entire \$175, and devoted it to his own use without due effort to allow his client to have any part of it." The referee further says: "If in the case of the respondent it can be inferred that he was unconscious of the inherent gravity and quality of his act it is sufficient to note that his moral and mental perceptions should be so acute that he could feel and know the real nature of the transgression. Otherwise he is not qualified to be trusted with the powers and duties that belong to the office of attorney of courts of justice. It is the failure of the respondent to appreciate this true aspect of the affair that has led him into his present difficulty, and brought the train of events so embarrassing to him and his client."

The learned referee also found that notwithstanding the

respondent's claim to have sent \$100 of this money to his client, the fact was that he did not send any money. The respondent himself admitted that he feared to send the money, as such a fact might be used against him in the present proceeding. But he did, however, pay \$75 during the pendency of the proceedings, and with the approval of the official referee. The respondent gave various excuses for not having paid the money over prior to the time that the Bar Association took action, and as to this the official referee says: "All this delay was not mere neglect, nor mere inertia, nor mere passivity, nor the result of absence, preoccupation, or forgetfulness in the absorption of other business. Much less was it a bold, straightforward, honest assertion of right to have a full and complete settlement before making any payment, an attitude pronounced, made known to the client, maintained bravely and uncompromisingly before the Bar Association, before the court and in this proceeding. Respondent found it convenient to use the money for a time and let its final payment await his ability or convenience to pay, indifferent to his troubled clients, to his breach of duty, to the accusation it merited, and the conclusion of grave fault it compelled." The referee concludes his report as follows: "I consider that the court should consult as to the punishment that would teach respondent and others similarly inclined that a client's money is not the attorney's property for any period of time, and that while an attorney is in no peril for demanding full compensation there must be no shadow upon his good faith." The evidence taken before the referee fully justifies the condemnation by him.

While the offense of this respondent is most serious, we hesitate, in view of the referee's report, to recommend disbarment. We think, however, that a suspension from practice is the proper disposition to be made of this matter.

The report of the official referee is, therefore, confirmed and the respondent is suspended from practice for the period of six months from the date of the entry of the order herein.

BLACKMAR, P. J., MILLS, RICH and KELLY, JJ., concur.

Motion to confirm report of official referee granted. The respondent is suspended from practice for a period of six months from the date of entry of the order herein.

CHARLES P. LENNOX, Respondent, v. DOUGLAS E. LENNOX  
and Others, Defendants.

SAMUEL J. MASHKOWITZ, Purchaser, Appellant.

Second Department, June 24, 1921.

**Partition — failure to secure order designating person on whom service of summons should be made for infant defendant — order procured after sale with consent of purchaser — approval of sale by referee on rehearing — defect cured — new interlocutory judgment and sale not required — purchaser not entitled to return of deposit.**

Defect in an action for partition arising from the failure to procure an order designating a person on whom the summons might be served in behalf of an infant defendant is cured where, after the sale of the property, with the consent of the purchaser and due notice to all the parties, an order is procured making the proper designation and the summons is served on the designated party who is subsequently appointed guardian *ad litem* and on a rehearing before the referee the guardian testifies that it is for the best interests of the infant that the sale be confirmed and the court thereafter makes an order confirming the sale.

It was not necessary, under the circumstances of this case, for the court to enter a new interlocutory judgment and direct a new sale.

A good and marketable title passed under the sale after said defect was cured, and the purchaser was not entitled to have his deposit on the purchase price returned to him.

APPEAL by Samuel J. Mashkowitz from an order of the County Court of Queens county, entered in the office of the clerk of the county of Queens on the 14th day of December, 1920, denying appellant's motion to compel the plaintiff and the referee herein to pay and return to him \$960 heretofore paid by him as a deposit on the purchase of certain real property sold in the above-entitled action, and also from an order entered in said clerk's office on the 27th day of April, 1921, directing the appellant to pay over the remainder of the purchase price upon receiving from the referee a deed to the premises described in the complaint and final judgment herein, duly executed in statutory form.

*Morris Meyers* [*Albert J. Rifkind* with him on the brief], for the appellant.

*Howard T. Hewlett*, for the respondent.

MILLS, J.:

This is an appeal by a purchaser at a partition sale of certain real estate situated in the borough of Queens, from two certain orders made by the County Court of Queens county, the one on December 14, 1920, which denied the motion of said purchaser for the return to him of the deposit of ten per cent made by him upon said purchase at the time of the sale and for other relief, and the other made April 25, 1921, which granted the plaintiff's motion to compel the purchaser to complete his said purchase.

The facts being undisputed are the following: The action is the ordinary one for the partition of real property. Interlocutory judgment of partition and sale was made July 17, 1920. After due advertisement the referee, on September 4, 1920, sold the premises at public sale to the appellant, who then, according to the terms of the sale, paid down ten per cent of the purchase price, amounting to \$960. He employed the Title Guarantee and Trust Company to search the title, and they rejected it upon the ground that an infant defendant under the age of fourteen years, who had a small interest in the property, had not been properly served with a summons, in that no order had been made designating a person upon whom service of the summons should be made in her behalf, as required by section 426 of the Code of Civil Procedure. This objection being made in behalf of the appellant, the plaintiff's attorneys proceeded forthwith to correct that defect by having such order then made, and service of the summons in behalf of that defendant made upon the person designated in that order. Thereafter, upon due application, that person was, by order duly made, appointed guardian *ad litem* over said infant defendant; and he duly qualified as such and interposed the usual infant's answer submitting her rights to the protection of the court. Thereafter the court made an order referring the matter back to the referee who, upon due notice to all parties, held a further hearing at which the guardian testified that he had fully examined the proceedings and the entire matter, and was convinced that the best interests of the infant required that the said sale should stand and be consummated. The referee reported to that effect, and the



court thereafter, on December 7, 1920, upon due notice to all parties, made an order accordingly confirming the sale. The Title Guarantee and Trust Company thereupon signified its willingness to pass the title as thus corrected. Apparently at first the appellant's attorneys were disposed to accept the title and complete the purchase as indicated by their letter of December 11, 1920. Later, perhaps from abundant caution, they took the opposite view, and the orders appealed from resulted.

The appellant's contention here is that the interlocutory judgment when entered and the sale when made were ineffective as to that infant defendant, and that the court could not subsequently make them effective, but could proceed only by entering a new interlocutory judgment under which a new sale could be had. The contrary to this appears to have been expressly held by our former General Term in *Rice v. Barrett* (35 Hun, 366). While that decision was reversed by the Court of Appeals (99 N. Y. 403), the reversal was solely upon the ground that there had been a long delay in taking the proceedings to cure the defect, and that those proceedings had not been taken, as evidently they were here, with the acquiescence of the purchaser. Here it is plain that the plaintiff proceeded at once to cure the defect. The cases cited by the learned counsel for the appellant rest upon the naked proposition that the failure to comply with the said requirement of section 426 prevented the court from having jurisdiction over the infant defendant. Neither of them dealt with the effect of any such attempt to cure the defect.

I advise, therefore, that the orders appealed from be each affirmed, with ten dollars costs and disbursements.

BLACKMAR, P. J., RICH, KELLY and MANNING, JJ., concur.

Orders of the County Court of Queens county affirmed, with ten dollars costs and disbursements.

ANDREW WAGNER, as Administrator, etc., of PAUL WAGNER, Deceased, Appellant, v. MOTOR TRUCK RENTING CORPORATION, Defendant, Impleaded with HAGERTY MOTOR TRUCKING COMPANY and RODGERS & HAGERTY, INC., Respondents.

Second Department, June 24, 1921.

**Master and servant — owner of motor trucks hired by general contractor to cart dirt at given rate per truck per day was independent contractor and responsible for negligence of driver of truck rented from third party — general contractor not responsible — fact that trucks bore name of general contractor immaterial.**

A motor trucking company which was engaged by a general contractor to cart dirt at a given rate per day for each truck was an independent contractor and is responsible for the negligence of a driver of a truck hired by it with driver from a third party over which driver it had general control at the time of the accident, but the general contractor is not responsible for such negligence.

The fact that the motor trucks bore the name of the general contractor and that the drivers thereof wore badges marked with the initials of the general contractor does not make it liable for the negligence of a driver, since the general contractor was engaged in constructing an army base for the United States government which permitted only the employees of the contractor and its subcontractors to be admitted to the place where the work was going on.

APPEAL by the plaintiff, Andrew Wagner, as administrator, etc., from that part of a judgment of the Supreme Court in favor of the defendant Hagerty Motor Trucking Company, entered in the office of the clerk of the county of Kings on the 21st day of December, 1920, upon the verdict of a jury, and from that part of said judgment entered upon an order setting aside a verdict in favor of plaintiff and against the defendant Rodgers & Hagerty, Inc., for \$15,000, and also from that part of an order entered in said clerk's office on the 9th day of December, 1920, directing that a general verdict be entered in favor of the defendant Hagerty Motor Trucking Company, and from that part of said order setting aside a verdict in favor of the plaintiff and against the defendant Rodgers & Hagerty, Inc., and dismissing plaintiff's complaint.

*George F. Hickey*, for the appellant.

*Louis Cohn*, for the respondent Hagerty Motor Trucking Company.

*Walter L. Glenney* [*Bertrand L. Pettigrew* with him on the brief], for the respondent Rodgers & Hagerty, Inc.

JAYCOX, J.:

The Turner Construction Company was engaged in the erection of an army supply base in the borough of Brooklyn. This work was done under a contract with the United States government. The respondent Rodgers & Hagerty, Inc., was doing the work of excavation under a subcontract with the Turner Construction Company. The Hagerty Motor Trucking Company, Inc., had an agreement with Rodgers & Hagerty, Inc., whereby it (the Hagerty Motor Trucking Company, Inc.) agreed to furnish trucks for the disposition of excavated material at thirty dollars each per day — ten hours to constitute a day's work, overtime to be paid at the rate of three dollars an hour. Rodgers & Hagerty, Inc., had no trucks and did not attempt to dispose of any of the material in any way except by means of the trucks furnished by the Hagerty Motor Trucking Company, Inc. The Hagerty Motor Trucking Company, Inc., did not have sufficient trucks to take care of all of the material excavated. It, in turn, hired trucks with drivers from the Motor Truck Renting Corporation, and one of the trucks thus rented ran over and killed the plaintiff's intestate. The jury has found that the driver of this truck was guilty of negligence and that the plaintiff's intestate was free from contributory negligence.

The question as to whose servant the driver of the truck was at the time of the happening of the accident must necessarily be determined in this action. Upon the first trial of the action the court dismissed the complaint as against the Hagerty Motor Trucking Company, Inc., and the Motor Truck Renting Corporation, and the jury rendered a verdict against Rodgers & Hagerty, Inc. The plaintiff appealed from the dismissal of the complaint as against the Hagerty Motor Trucking

Company, Inc., but did not appeal from the dismissal of the complaint as to the Motor Truck Renting Corporation. Rodgers & Hagerty, Inc., appealed from the judgment against it. The judgment against Rodgers & Hagerty, Inc., was reversed, as was also the dismissal of the complaint against the Hagerty Motor Trucking Company, Inc. (*Wagner v. Rodgers & Hagerty, Inc.*, 193 App. Div. 912.) Upon the retrial the court submitted to the jury the following questions and took a special verdict thereon: "Q. Was there negligence on the part of Delahanty, the driver of the automobile truck?" "Q. Was there any negligence on the part of the deceased that contributed to the accident?" "Q. Whose servant was Delahanty, the driver of the automobile truck, at the time of the accident?" The jury answered the first question in the affirmative, the second in the negative, and the third, "Rodgers & Hagerty, Inc.," and rendered a general verdict against that defendant for the sum of \$15,000.

The court, upon the motion of the defendant Rodgers & Hagerty, Inc., set aside the general verdict and dismissed the complaint. Judgment was thereupon entered by order of the court in favor of the Hagerty Motor Trucking Company, Inc., in accordance with the special verdict, and in favor of Rodgers & Hagerty, Inc., dismissing the plaintiff's complaint, with costs in both instances.

The jury having found that the driver of the automobile truck was guilty of negligence which caused the plaintiff's intestate's death, and that such intestate was free from contributory negligence, it seems to me clear that the plaintiff is entitled to recover from one of the defendants. The court has held, correctly I think, that the Motor Truck Renting Corporation was not in control of the driver at the time of the happening of the accident so as to be responsible for his negligence. Therefore, if the general employer of the driver — the Motor Truck Renting Corporation — did not control the driver at the time of the happening of the accident, the question naturally arises, who did control him? This question is answered by determining in whose work the driver was engaged.

In *Matter of Schweitzer v. Thompson & Norris Co.* (229 N. Y. 97) Judge CRANE, in the prevailing opinion, said: "It

is well settled that one may be in the general service of another and nevertheless with respect to particular work may be transferred with his own consent or acquiescence to the service of a third person so that he becomes the servant of that person with all the legal consequences of the new relation. (*Standard Oil Co. v. Anderson*, 212 U. S. 215, 220.) Difficulty frequently arises in determining when this transfer of relationship takes place. The rule was stated in this court in *Hartell v. Simonson & Son Co.* (218 N. Y. 345, 349) to be the following: 'A servant in the general employment of one person, who is temporarily loaned to another person to do the latter's work, becomes, for the time being, the servant of the borrower, who is liable for his negligence. But if the general employer enters into a contract to do the work of another, as an independent contractor, his servants do not become the servants of the person with whom he thus contracts, and the latter is not liable for their negligence.' The cases of *Kellogg v. Church Charity Foundation of Long Island* (203 N. Y. 191) and *Schmedes v. Deffaa* (153 App. Div. 819; 214 N. Y. 675) were cited as illustrations of the distinction."

In this case it is clear that the driver of the truck was not engaged in the work of his general employer, but that he was doing the work of either the Hagerty Motor Trucking Company, Inc., or Rodgers & Hagerty, Inc. Rodgers & Hagerty, Inc., had no trucks and did no part of the removal of the excavated material. The Hagerty Motor Trucking Company, Inc., on the other hand, removed all of this material and for this purpose furnished whatever number of trucks was necessary. The amount of the work it was to do was determined by the amount of material excavated. The number of trucks it was to supply was fixed in the same way; the number was to be adequate to remove the excavated material. The Hagerty Motor Trucking Company, Inc., under this arrangement became an independent contractor. It was required to remove all of the excavated material and its pay depended upon the number of trucks engaged in that work each day. That the trucks bore the name of Rodgers & Hagerty, Inc., that the drivers wore badges marked R & H, in no wise affects this conclusion. At the time this country was engaged in the great World War and the work being done

in the construction of this army base necessarily could not be thrown open to the general public. The government, therefore, permitted only the employees of the contractor and its sub-contractors to be admitted to the inclosure; therefore, it was necessary that the trucks bear the name of Rodgers & Hagerty, Inc., and the drivers wear the badges of the same corporation. The government paid on the cost plus plan. Therefore, it had employees who kept records of the number of trucks employed in the work. Rodgers & Hagerty, Inc., being paid under this plan, was desirous of seeing that it was paid for all the trucks engaged in the work, and as it paid for the trucks by the same method it was also desirous of seeing that it was charged for no more trucks than it received pay for. This explains the employment by Rodgers & Hagerty, Inc., of men known as "chasers," and shows the reason why that company was interested in seeing that each truck did a day's work.

On the prior appeal we held that the finding that the driver Delahanty was in the special employ of Rodgers & Hagerty, Inc., was contrary to the evidence. The evidence in that respect has not been materially changed upon the new trial and the finding of the jury is still opposed to the weight of the testimony. If I am correct in my conclusion that the Hagerty Motor Trucking Company was an independent contractor, then the verdict of the jury in favor of that defendant is also contrary to the evidence. Of the adjudicated cases, *Schmedes v. Deffaa* (*supra*) affords the closest parallel to this case. There the defendant was the keeper of a livery stable. He received an order from an undertaker to furnish a number of horses and carriages to attend funerals. He did not have sufficient horses and carriages for the purpose, so he applied to another livery stable keeper, who sent an additional carriage with a driver. This driver reported to the undertaker, who directed him to go to the house where the funeral was to be and then to proceed with the funeral party to the cemetery. This carriage was in an accident, which gave rise to the action in question. It was held in the Appellate Division that the defendant was not liable upon the ground that he had no control over the driver and had no authority to employ or discharge him. From this decision

Justices LAUGHLIN and MILLER dissented, and the Court of Appeals reversed the decision of the Appellate Division upon the opinion of Justice MILLER (214 N. Y. 675). Justice MILLER in the course of his opinion said (153 App. Div. 822): "As between the undertaker and the defendant, the latter was an independent contractor, and the driver, though subject to the former's instructions as to where he should go, was doing the latter's work and was for the time being under his control, precisely as though in his general employment. As between the general employer and the defendant, the driver was merely loaned by the former to the latter." A closer analogy to the present case cannot be imagined. Rodgers & Hagerty, Inc., was the general contractor and occupied a position similar to that of the undertaker in the case cited. As in that case, it sublet all its work of a particular character, the removal of the excavated material, by arranging with the Hagerty Motor Trucking Company, Inc., for its removal. The Hagerty Motor Trucking Company, Inc., therefore, occupied a position similar to that of the first livery stable keeper — the defendant in the cited case. Not having sufficient trucks, it obtained additional trucks from the Motor Truck Renting Corporation, and this corporation's position was the same as that of the livery stable keeper who furnished the additional carriage and driver. The driver of the truck concerned in this accident was, therefore, the servant of the Hagerty Motor Trucking Company, Inc., because he was engaged in doing its work. Rodgers & Hagerty, Inc., was not responsible for his neglect, as he was not doing its work — it having arranged with the Hagerty Motor Trucking Company, Inc., to do all of that work. Under this arrangement the Hagerty Motor Trucking Company, Inc., became an independent contractor.

The judgment and order dismissing the complaint as to Rodgers & Hagerty, Inc., should be affirmed, with costs. The special verdict of the jury in favor of the Hagerty Motor Trucking Company was contrary to the evidence, and the judgment thereon should be reversed and a new trial granted, with costs to abide the event.

BLACKMAR, P. J., MILLS, RICH and PUTNAM, JJ., concur.

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Judgment and order dismissing the complaint as to Rodgers & Hagerty, Inc., unanimously affirmed, with costs. The special verdict of the jury in favor of the Hagerty Motor Trucking Company was contrary to the evidence, and the judgment thereon is reversed and a new trial granted, with costs to abide the event.

MARY F. KELLY, Plaintiff, v. FREDERICK J. SCHRAMM,  
Defendant.

Second Department, June 24, 1921.

**Mortgages — foreclosure — personal service without State on non-resident defendant — certificate of Secretary of State as to notary's power to act not attached to affidavit of service — new affidavit with certificate filed nunc pro tunc after sale — judgment of foreclosure valid — purchaser has good title.**

A purchaser under a foreclosure sale acquires good title to the land, though the affidavit of the service of the summons on the defendant, who was a non-resident of the State at the time, did not have attached thereto the certificate of the Secretary of State as to the notary's power to act, where it appears that after the sale the person making the service executed another affidavit to which a proper certificate was attached and an order was made permitting the filing of the last affidavit together with the certificate referred to, *nunc pro tunc*, as of the date of the filing of the original affidavit of service, and that said non-resident defendant has never claimed that she was not personally served, or that the service was in any way defective or irregular.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*Mortimer M. Menken*, for the plaintiff.

*Henry Koch*, for the defendant.

MANNING, J.:

The question which the parties to this controversy seek a determination of, is the validity of a judgment of foreclosure and sale, rendered in an action in the Supreme Court, Queens county, as to a defendant served without the State of New York.



The plaintiff has derived title to the real property affected by the judgment in foreclosure, and has contracted to sell such property to the defendant.

The defendant has rejected the title upon the ground that an affidavit of service of the summons and complaint made upon one Emma M. Partello, by Ralph E. Flesher, a deputy sheriff of McLean county, Ill., on March 24, 1916, is defective, for the reason that no authentication certificate was thereto attached, as required by section 844 of the Code of Civil Procedure.

It concededly appears that service of the summons and complaint upon Emma M. Partello was made personally by the deputy sheriff on the 24th day of March, 1916; that he verified his affidavit of service on the 24th day of March, 1916, but failed to have attached thereto the certificate of the Secretary of State of the State of Illinois as to the notary's power to act. (See Real Prop. Law, § 299; Id. § 311, as amd. by Laws of 1913, chap. 209.) Afterwards, however, on the 22d day of November, 1920, he reswore to another affidavit of service, and to this a proper certificate from the Secretary of State was attached; and thereafter, on December 2, 1920, an order was made at Special Term, allowing the filing of the last affidavit together with the certificate referred to, *nunc pro tunc* as of March 31, 1916, the date of the filing of the original affidavit of service.

The defendant claims that the affidavit of service filed in the foreclosure suit hereinbefore mentioned is no affidavit at all, for the reason that it was not in such form as to constitute it *proof*. He says that the word "proof" is synonymous with the word "evidence," and cannot be held to be statements not admissible as evidence. He also argues that the word "affidavit" as used in section 443 of the Code of Civil Procedure means an affidavit which amounts to evidence which is *proof*.

He argues that *substituted service* may only be made as provided by statute, and service cannot be deemed complete *until* all the things required be done. He states that the statute (Code Civ. Proc. § 443, subs. 4, 5) requires among other things necessary to complete the service, the filing of *proof* of such service; that no such proof was filed until long

after the sale in foreclosure and the delivery of the referee's deed. Such an omission, he claims, is a jurisdictional defect, and that the court cannot acquire jurisdiction *nunc pro tunc*.

I am inclined to the belief that the defendant's position here is extremely technical. Sections 721, 722 and 723 of the Code *expressly* provide for such a situation, 722 especially, which reads as follows: "Each of the omissions, imperfections, defects, and variances, specified in the last section, *and any other of like nature, not being against the right and justice of the matter*, and not altering the issue between the parties, or the trial, *must*, when necessary, be supplied, and the proceeding amended, by the court wherein the judgment is rendered, or by an appellate court." Section 721 of the Code provides that no judgment of a court of record shall be impaired or affected "3. For an imperfect or insufficient return of a sheriff or other officer; or because an officer has not subscribed a return, actually made by him."

The decisions of our courts have uniformly been such as to emphasize these principles wherever the question has arisen, either before or since the Code provisions. As was said by PARKER, Ch. J., in *Stuyvesant v. Weil* (167 N. Y. 421, 426), in a case where substantial amendment in changing the name of an owner of property after the judgment was allowed: "We have not alluded to the decisions of the several Special and General Terms which the Appellate Division felt called upon to follow. Their foundations were laid long before sections 721 and 723 of the Code came into existence as marking features of a distinct legislative policy to stop the sacrifice of things of real substance upon the altar of mere technicality, and hence a discussion of them can serve no useful purpose."

The plaintiff claims that the court had jurisdiction to render judgment of foreclosure and sale.

Section 438 of the Code as it existed at the time of the service of the process in this case reads as follows:

"§ 438. *Cases in which service of summons by publication, et cetera, may be ordered.* An order directing the service of a summons upon a defendant, by publication, may be made in either of the following cases: \* \* \*

"5. Where the complaint demands judgment, that the

defendant be excluded from a vested or contingent interest in or lien upon, specific real or personal property within the State; or that such an interest or lien in favor of either party be enforced, regulated, defined, or limited; or otherwise affecting the title to such property." (See Laws of 1914, chap. 346.)

Section 443 of the Code then provided:

" § 443. *Service without the State.* \* \* \*

" 3. In the cases specified in subdivision five of section four hundred and thirty-eight the summons may be served without an order, upon a defendant without the State in the same manner as if such service were made within the State, except that a copy of the complaint shall be annexed to and served with the summons.

" 4. Service without the State is complete ten days after proof thereof is filed.

" 5. When the summons is served personally without the State the affidavit of service must show that the person making it is a resident of the State of New York, or a sheriff, under sheriff, deputy sheriff or constable of the county or other political subdivision in which the service is made, or an officer authorized by the laws of this State to take acknowledgments of deeds to be recorded in this State.

" 6. A judgment shall be conclusive upon a defendant on whom the summons is personally served without the State, with respect to the property which is the subject of the action, or which is attached therein, to the same extent as if the service upon him were made within the State." (See Laws of 1914, chap. 346.)

The plaintiff claims that all of the provisions of this statute were complied with. He says that the action is one of those specified in subdivision 5 of section 438, and as to the defendant Emma M. Partello demanded judgment excluding her from her interest in the mortgaged property, the subject-matter of the action. *Secondly*, that a copy of the complaint was annexed to the summons, and the summons and complaint were *personally* served on said Emma M. Partello at Normal, McLean County, Ill., by a deputy sheriff of said county; that his affidavit of service was filed, and that the service upon her became complete ten days after such filing, which

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was March 31, 1916; and that after the additional twenty days had expired the usual proceeding for the entry of judgment of foreclosure and sale took place.

The record shows that the defendant Emma M. Partello at the time of the service of the summons and complaint was in possession of the premises affected. Upon delivery of the deed to the plaintiff, she entered into possession of the premises, and for a period of nearly five years, last past, she has been in quiet, peaceful and undisturbed possession thereof. No objection has ever been raised by Emma M. Partello, and no attempt has been made by her to regain possession of the premises, and she has apparently acquiesced in the judgment and relinquished possession of the property in favor of the plaintiff. No claim has been made by Emma M. Partello or on her behalf that she was not personally served, or that the service was in any way defective or irregular. She has never appeared or served any pleading in the action or attempted to do so. And the plaintiff, summarizing the situation, claims that the objection of the defendant to the title is without merit. The claim of the plaintiff is that the one essential fact upon which the jurisdiction of the court to render judgment depended, *was the personal service* of the summons and complaint upon the defendant Emma M. Partello, whereby she had *actual* notice of the commencement of the action, of the claim that was made against her, and of the judgment demanded.

I think the claim of the plaintiff is justified by the facts and also by the force of previous decisions. (See *Maples v. Mackey*, 89 N. Y. 146; *White v. Bogart*, 73 id. 256; *Stuyvesant v. Weil*, 167 id. 421; *Lindsley v. Van Cortlandt*, 67 Hun, 145; *Mishkind-Feinberg Realty Co. v. Sidorsky*, 189 N. Y. 402.)

Judgment is, therefore, rendered for the plaintiff as requested and prayed for in the submission, with costs.

BLACKMAR, P. J., MILLS, RICH and KELLY, JJ., concur.

Judgment for plaintiff on agreed statement of facts, with costs.

CATHERINE MARTIN, Respondent, v. METROPOLITAN LIFE  
INSURANCE COMPANY, Appellant.

First Department, July 1, 1921.

**Workmen's Compensation Law — injury arising out of and in course of employment — tracer in defendant's employ injured by negligence of elevator operator, also in defendant's employ, while on her way to street during her luncheon hour for personal purpose — remedy under Workmen's Compensation Law and not by action for negligence.**

The plaintiff, who was employed by the defendant in its tracing department, sustained an injury arising out of and in the course of her employment, within the meaning of the Workmen's Compensation Law, and cannot recover in an action for negligence, where it appears that during her luncheon hour she went down on one of defendant's passenger elevators, from the floor on which she worked, on a personal errand, and was injured by reason of the operator's negligence as she was about to leave the elevator, for the employer not only contracted to furnish her a safe entrance, but a safe exit whenever she had occasion or had the right to leave the premises, whether for further work on behalf of her employer or for her own purposes.

PAGE, J., dissents, with opinion.

APPEAL by the defendant, Metropolitan Life Insurance Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 30th day of October, 1920, upon the verdict of a jury for \$55,000, and also from an order entered in said clerk's office on the 1st day of November, 1920, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*Frank Verner Johnson* of counsel [*William J. Tully, E. Clyde Sherwood* and *Harry C. Bates* with him on the brief; *Benjamin C. Loder*, attorney], for the appellant.

*Moses Feltenstein* of counsel [*Harold R. Medina* with him on the brief; *Joseph Jeromer*, attorney], for the respondent.

SMITH, J.:

The action is for negligence. The plaintiff was employed by the defendant in its tracing department on the eleventh

floor of its building, No. 1 Madison avenue, New York city. This is a large building occupying the entire block, owned by defendant, and occupied both by the defendant and by tenants. Elevator service is maintained in the building for the use of employees and others, and it was in connection with the use of one of these elevators that the plaintiff was injured.

It seems to have been assumed upon the trial that the defendant was included among the employers who were contemplated by the Workmen's Compensation Law, and that it employed more than four people, who were thus engaged in a hazardous employment within the protection of the act, and defendant thus employing more than four people in a hazardous employment, all of the employees are brought within the protection of the act. (*Krinsky v. Ward*, 193 App. Div. 557; *Matter of Europe v. Addison Amusements*, 231 N. Y. 105.)

The main question argued is as to whether this injury happened while in the defendant's employ and arising out of such employment. The work of the plaintiff was upon the eleventh floor. Upon the twelfth floor there was a luncheon furnished free to all the employees. There was no elevator service between the eleventh and twelfth floors. The employees were given thirty-five minutes to procure their luncheon, either within the building or without, or, for such use as they might make of the time if they did not care to procure luncheon. Upon the day in question the plaintiff went from the eleventh to the twelfth floor, procured her luncheon, came back to the eleventh floor, went to her desk and got her pocketbook and started down the elevator. The exact purpose for which she came down perhaps is not clear. There is some evidence that her purpose was a personal one, in order to get a birthday present for her sister, whose birthday was the succeeding day. This, however, I do not deem to be very material, in view of the construction which I have placed upon the statute in question. While the statute requires that in order to come within the act the injury must arise out of and in the course of the employment, it necessarily covers any act done as incidental to that employment. (See § 10; *Id.* § 3, subd. 7, as amd. by Laws of 1917, chap. 705.)

In this case with the service performed upon the eleventh floor, the defendant was required, incident to the employment, to furnish elevator service which would make a safe entrance and a safe exit to her place of employment. The fact that this elevator was used by other people and by tenants, or the public, does not matter, as long as it is furnished by the defendant, and as long as it is necessary to the performance of the plaintiff's work. The plaintiff was coming down the elevator and by reason of the negligence of the operator of the elevator, as she was about to get out, the elevator started up and caused her injuries, for which she complains. It cannot matter if the plaintiff was coming from the building for an individual or personal purpose; when she leaves the building at night and goes to her home that is for a personal purpose. The defendant is bound to furnish a safe entrance and a safe exit at any time that her service is not required. In fact, if the employment be not deemed to extend over the noon recess, the defendant could require the plaintiff to leave the building. That safe entrance and safe exit which the defendant is required to furnish in addition to this employment is a safe exit at any time for any purpose when the plaintiff's time is not demanded under her contract in the defendant's building. This case is clearly distinguishable from *Pierson v. Interborough Rapid Transit Co.* (184 App. Div. 678; *affd.*, 227 N. Y. 666), because that was not a necessary exit, but one which Pierson was at liberty to choose or not, as he might elect. It was there held that in his choice of the use of the elevated railroad for a personal purpose he was not continuing in the employment. The same distinction exists in *Matter of Kowalek v. New York Consolidated R. R. Co.* (229 N. Y. 489). There is no case holding that where by reason of the necessities of the situation the defendant is required to furnish access and exit, that such access and exit are not necessarily incidental to the work performed, and an injury occurring in connection therewith is not an injury which is covered by the Workmen's Compensation Law. The case of *Ross v. John Hancock Mutual Life Ins. Co.* (222 Mass. 560) is distinguishable because the elevator was not there being used as an exit from the building, but was being used for the purpose of going from one floor to another in the

building to accomplish an individual purpose, and not in the business of the defendant. That case would seem to be in harmony with *Matter of DiSalvio v. Menihan Co.*, decided by our Court of Appeals (225 N. Y. 123).

In the *Kowalek Case* (229 N. Y. 489) the rule is stated: "It is a general rule that if an employee is injured on the premises of the employer in going, with reasonable dispatch and method, to or from actual performance of the specific duties of the employment by a way provided by the employer or reasonably used by the employee, compensation must be awarded. The going to and from the actual work and the risk involved in it are reasonably incidental to the employment."

In the *Pierson Case* (184 App. Div. 678; affd., 227 N. Y. 666), upon which the plaintiff relies, Mr. Justice SHEARN said: "Furthermore, it seems right that a motorman or guard who has been taken to the end of the line and is compelled to lay off for two hours or so before the next run should be protected by the act in the case of an injury sustained while in the precincts of the company awaiting his next tour of duty. There would, of course, be no question but that a motorman who had thus gone to the end of his line and who was provided a waiting place a few stations removed and who rode on the train to that waiting place and was injured on the way would be said to have sustained an injury growing out of and in the course of his employment."

In *White v. Slattery Co.* (236 Mass. 28) the employee was going out of the building to get some theatre tickets, using an elevator provided for the employees. The opinion of the court in part reads: "The only reasonable inference of which these facts and the evidence are susceptible is that the injury to the plaintiff arose out of and in the course of her employment. When she entered the store on her way to work and pursued the proper course to the place of her labors, while in the performance of her duties as an employee and until she left the store by the ordinary means of exit, she was engaged in the pursuit of her employment, entitled to the protection and subject to the limitations of the Workmen's Compensation Act." And further: "The plaintiff was leaving the store of her employer with the purpose of doing



an errand on her own account having no relation to her employment. That fact is of no consequence under these circumstances. She was doing it on her own time and not on her employer's time. She was in this particular in the same condition she would have been in leaving the store at the end of her labor for the day. She had a right under the terms of her employment to go out at the lunch hour on her own affairs. She was as much within the scope of her employment as were any of the employees in the cases cited where they have been held within the protection of the act." (See *Latter's Case*, 130 N. E. Rep. [Mass.] 637.)

It seems to be conceded that if the plaintiff had been going to her work and had been injured in this elevator, she would come within the Workmen's Compensation Law and I do not understand the plaintiff's counsel to contend if she were leaving her employment at the end of the day that she would not be within the Workmen's Compensation Law. The distinction upon which he insists is that she was leaving at this particular time on a personal errand. But within the *White* case in Massachusetts, that distinction is held not to alter the rule of law, and this holding is well supported by sound reason, because the employer not only contracted to furnish her a safe entrance, but a safe exit whenever she had occasion, or had the right to leave the premises, whether for further work on behalf of her employer or for her own purposes.

In my judgment the plaintiff is covered by the Workmen's Compensation Law and cannot recover in an action for negligence.

The judgment is, therefore, reversed, with costs, and the complaint dismissed, with costs.

CLARKE, P. J., LAUGHLIN and MERRELL, JJ., concur;  
PAGE, J., dissents.

PAGE, J. (dissenting):

I cannot concur with the view of the majority of the court that the plaintiff has a right to compensation for her injuries under the provisions of the Workmen's Compensation Law, and, therefore, this judgment must be reversed. The plaintiff was employed in the principal office of the defendant at No.

1 Madison avenue in the city of New York, a building which it owned and operated. This building was largely occupied by the company for its offices; portions of it, however, were leased to tenants. It was conceded that the defendant had complied with the provisions of the Workmen's Compensation Law, and had secured compensation to its employees as prescribed therein, and that its employees, including this plaintiff, were subject to the provisions of that statute. The sole question, therefore, to be determined is whether the plaintiff's injuries arose out of and in the course of her employment. (See § 10; Id. § 3, subd. 7, as amd. by Laws of 1917, chap. 705.) The facts of the case in regard to the injury are as follows:

The plaintiff was employed on the eleventh floor of the building. Her working hours were from nine o'clock in the morning until four-thirty in the afternoon with thirty-five minutes for luncheon, rest and recreation. The plaintiff's time for luncheon was from eleven-forty-five until twelve-twenty. The defendant served lunch to its employees on the twelfth floor. A stairway led from the eleventh floor, where plaintiff was employed, to the twelfth floor. On January 23, 1920, the plaintiff, having finished her luncheon, came down the stairway from the lunch room on the twelfth floor at a little after twelve o'clock to the room in which she worked, got some money from her desk, and took one of the regular passenger elevators to the ground floor, for the purpose of purchasing a gift for her sister at a nearby store. When the elevator came to a stop at the ground floor and the doors were opened by the operator the plaintiff was the first to leave the car, and as she was in the act of stepping out, the elevator suddenly started upward, the plaintiff's head came into contact with the top of the door frame, and she fell out and down to the bottom of the shaft, suffering severe injuries.

"The words 'arising out of and in the course of the employment' have a clear and definite meaning and an award can be made under the statute only when the injuries arise out of both." (*Matter of Clark v. Voorhees*, 231 N. Y. 14; *Matter of Schultz v. Champion Welding & Mfg. Co.*, 230 id. 309.)

"The words 'arising out of and in the course of employment' are conjunctive, and relief can be had under the act only

when the accident arose both 'out of' and 'in the course of' employment. The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work." (*Matter of Heitz v. Ruppert*, 218 N. Y. 148, 151; *Matter of Daly v. Bates & Roberts*, 224 id. 126.)

The Supreme Court of Massachusetts has said in relation to the same phraseology contained in the Workmen's Compensation Act of that State: "The relief is so new that the tendency may be to inquire only as to the employment and the injury and to assume that these two factors constitute ground for compensation. But the essential connecting link of direct causal connection between the personal injury and the employment must be established before the act becomes operative. The personal injury must be the result of the employment and flow from it as the inducing proximate cause \* \* \* The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being." (*Madden's Case*, 222 Mass. 487, 495.)

When the plaintiff returned from lunch, took her money, left the room where she was employed, and started for the store, she was not doing anything she was employed to do, nor was it anything incident to or connected with the employment. She was engaged in her own personal affairs, and upon business of her own. The fact that the elevator she used may have been one that she would have used in coming to or returning home from her work, does not render the employer liable under the act, for she was not using it for that purpose, nor for the purpose of going from the building to perform some work incident to, and as a part of, her duty as an employee. The fact that injury happened in the employer's building, in a portion of which the plaintiff worked, does not bring her within the act unless she was at the time engaged in her employment and the injury arose out of the employment.

In *Urban v. Topping Brothers* (184 App. Div. 633) the employee had quit work at five-thirty-five, his quitting time being five-thirty, and had gone to the door; but remem-

bering that some of his companions with whom he usually went home were still in the building he turned back and thrust his head into the shaft of the freight elevator, and called down to them, and was crushed by a descending car. The court held that the injury did not arise out of his employment. In *Pierson v. Interborough Rapid Transit Co.* (184 App. Div. 678; affd., 227 N. Y. 666) a guard in the employ of the defendant was injured during a two-hour period off duty, by the collision of the train in which he was riding with another of the defendant's trains, while he was on his way from a terminal, where he had just finished his tour of duty, to his dentist's. This court held that the injury did not arise out of or in the course of his employment. In *Matter of Kowalek v. New York Consolidated R. R. Co.* (229 N. Y. 489) an employee who had finished his work for the day went out upon the station platform with the intention of taking a passenger train to his home, the company permitting its employees to do so without charge; and he was killed. The Court of Appeals held that the injury did not arise out of or in the course of his employment. The decedent did not stand on the platform as an employee but as a prospective passenger. "The danger to which he was there exposed existed as to all persons who exercised the common privilege of going there for the purpose of being transported. It was neither connected with nor increased by the hazards of the actual duties of the employment." (p. 493.)

In *Matter of DiSalvio v. Menihan Co.* (225 N. Y. 123) the employee, who was working in a factory, had finished the work assigned him and while waiting for other work to arrive walked across the room to say good-bye to another workman who had been drafted, and was about to leave to join the army. While talking to his friend he was injured. The Court of Appeals held that the case was not one for compensation, saying: "This act did not enable him either directly or indirectly, in any tangible sense, the better to perform his work, discharge his duties or carry forward the interests of his employer. It was not a natural incident to the work for which he was hired. \* \* \* It was simply and solely the expression of a private desire and the consummation of a personal purpose."

The case of *Ross v. John Hancock Mutual Life Ins. Co.* (222 Mass. 560; cited with approval, 229 N. Y. 494) is quite similar to the instant case. An employee of the defendant, working on the tenth floor, during the lunch period entered the elevator for the purpose of delivering a Christmas present to another employee on the ninth floor. While she was in the act of getting off, the elevator started and she was fatally injured. The elevator was owned and operated by the defendant and the building was occupied also by others as tenants. The court held the action maintainable, saying: "Plainly the fact that the plaintiff's intestate was in the general employ of the defendant is not decisive. In this building, occupied by many tenants, she might ride in the elevator in pursuance of her work for the defendant, or she might ride entirely on her own business as a passenger \* \* \*. Outside of her working hours, however, she had the same right to use the elevator as any of the general public. During the luncheon period her time was her own." (p. 561.)

From these decisions it follows, in my opinion, that we should hold that at the time that the injury happened to this plaintiff she was on the elevator, not as an employee of the defendant, but as one having the same rights as the general public, and the dangers to which she was thus exposed did not arise out of nor were they incidental to her employment, but were such as were common to all passengers on elevators; that she was not engaged at the time of the injury in the work of her employment, and the injury did not arise out of her employment. Therefore, she was not within the Workmen's Compensation Law and could maintain the action.

The verdict of the jury as to the defendant's negligence and the plaintiff's freedom from contributory negligence was fully warranted.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, Successor by Merger to the VAN NORDEN TRUST COMPANY, as Trustee under a Certain Deed of Trust Dated March 11, 1907, between ATHOL MORTON MILLER and THE VAN NORDEN TRUST COMPANY, Respondent, v. ANNIE E. MILLER, Appellant, Impleaded with UNITED STATES TRUST COMPANY OF NEW YORK, as Executor, etc., of ANDREAS M. MILLER, Deceased, and Others, Defendants.

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**Trusts** — trust to pay interest "as and when received" to beneficiary and on his death to third person — interest accrued but not matured on death of first beneficiary goes to his estate — construction that accrued interest payable to second beneficiary would make instrument void under provisions of Personal Property Law, § 16, against accumulations — construction rendering instrument valid rather than void preferred.

Under a trust agreement placing certain municipal bonds in trust for the benefit of the father of the settlor during his life and upon his death for the benefit of the mother of the settlor, which directed the trustee to collect the interest and pay the same "as and when received" to the father of the settlor during his life, and on the death of the father to the mother, all interest, which had accrued on the death of the father, though not matured at that time, passes to the father's estate.

To construe the trust agreement to require the payment to the mother of interest accrued at the time of the death of the father, but not then matured, would make the trust instrument void, inasmuch as it would provide for an accumulation prohibited by section 16 of the Personal Property Law.

Since the provisions of the trust instrument are capable of two constructions, the court will adopt the construction which renders the trust legal and operative, rather than the one which will render it void.

LAUGHLIN, J., dissents, with opinion.

APPEAL by the defendant, Annie E. Miller, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of November, 1920, upon the decision of the court, rendered after a trial at the New York Special Term, directing that plaintiff pay to the United States Trust Company of New

York, as executor of the last will and testament of Andreas M. Miller, deceased, the sum of \$7,871.54, out of the balance of income remaining in its hands as shown on its accounting and that plaintiff is entitled to reimburse itself as trustee for the amount of such payment out of any income subsequently accruing on said trust fund.

*Stephen O. Lockwood* of counsel [*Lockwood & Lockwood*, attorneys], for the appellant.

*Franklin P. Ferguson* of counsel [*Arthur A. Gammell* with him on the brief; *Murray, Prentice & Aldrich*, attorneys], for the respondent.

DOWLING, J.:

On or about the 11th day of March, 1907, Athol Morton Miller, then residing in the city of Duluth, State of Minnesota, made and entered into a certain agreement or deed of trust with the Van Norden Trust Company, a corporation duly organized and existing under the laws of the State of New York; having its office and principal place of business in the city and county of New York, whereby he transferred, assigned and set over unto the Van Norden Trust Company, its successors and assigns, certain personal property more particularly described in said deed of trust, to have and to hold the same for the uses and purposes expressed in said deed of trust, and to collect and receive the interest, income and profit of said trust fund, and to pay said interest, income and profit as and when received to Andreas M. Miller, father of said Athol Morton Miller, during his life, and upon his death, to Annie E. Miller, mother of said Athol Morton Miller, during her life, and upon the death of the survivor, to assign, transfer and pay over the principal of said trust to said Athol Morton Miller, if he was then living, and if he should not be living, then as otherwise provided and set forth in said agreement.

The Van Norden Trust Company duly accepted the trust and received securities and personal property comprising the principal of said trust fund of the face value of \$408,000. It continued to perform the duties of trustee until September

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25, 1910, when its name was duly changed by order of the Supreme Court, New York county, to the Madison Trust Company.

The Madison Trust Company continued to perform the duties of trustee under said deed of trust until June 1, 1911, when it was duly merged into the Equitable Trust Company of New York, under and pursuant to the Banking Law of the State of New York, and the Equitable Trust Company of New York has since continued to perform the duties of trustee under said deed of trust.

The bonds which constituted the principal of the fund under said agreement were given outright by Andreas M. Miller to his son, Athol Morton Miller, who transferred and delivered the same to the Van Norden Trust Company.

Subsequently Andreas M. Miller executed and delivered three certain voluntary trust agreements with the United States Trust Company of New York, one of securities of the par value of \$700,000 for the benefit of his daughter, Maren Louise Miller Fellowes; the second of securities of the par value of \$336,373.32 for the benefit of his son, Athol Morton Miller, or his issue; and the third of securities of the par value of \$600,000 for his own benefit for life with remainder on his death to the city of Duluth, Minn., to establish a hospital and dispensary. The securities placed in trust under these agreements constituted the larger part of his possessions.

Said son and daughter were the only children of said Andreas M. Miller. Andreas M. Miller and his wife, Annie E. Miller, were, at the time of the execution of said agreement with the Van Norden Trust Company, living apart, he living in the city of New York and she in the city of Duluth, Minn.

The purpose of said Andreas M. Miller in the creation of those trusts was to dispose of the greater part of his property in such a manner as to provide for his children and to provide as well for the support of himself and his wife. At the time the deed of trust to the Van Norden Trust Company was made he declared that it was a trust practically for his wife; that he wanted the income reserved for himself while he lived, but that on his death he wanted everything to go to her that he personally did not get; that he wanted the income to go to himself during life because he thought it was safer;



but when he was through with it he wanted it to go to the people for whom it was intended.

The income of the said several trusts with the United States Trust Company of New York was payable to the beneficiaries therein named, and the income of the bonds transferred to the Van Norden Trust Company under said agreement was directed to be paid to Andreas M. Miller, as and when received, during his life, and to be paid to Annie E. Miller as and when received thereafter during her life, should she survive him.

The trust agreement made with the Van Norden Trust Company contains no power of sale or disposition and contains only the power to reinvest in the event of maturity and payment of the principal of the bonds passing to the trustee under said agreement; and then only to invest in securities of the same character and description, *i. e.*, municipal bonds of like character. All of the said bonds provided for payment of semi-annual interest payments, except one issue which provided for annual payments thereof.

During his lifetime Andreas M. Miller provided for the maintenance and support of his wife.

The trustee under the trust agreement dated March 11, 1907, held all the said bonds during the lifetime of Andreas M. Miller, except only \$25,000 of the Kansas City Judgment four and one-half which were paid off in July, 1915, and the proceeds invested in the purchase of Dayton, O., Water Works four and one-half per cent bonds bearing interest payable semi-annually, and managed the trust fund and received the income therefrom and paid over the same as and when received to Andreas M. Miller during his lifetime in accordance with the provisions of the deed of trust.

Andreas M. Miller died on May 22, 1917, leaving a last will and testament which was admitted to probate by the Surrogate's Court, county of New York, on the 25th day of July, 1917, and letters testamentary were issued thereon to the United States Trust Company of New York, which duly qualified and is now acting as such. By his will he gave to his daughter all of his property, which was of the value of about \$70,000 exclusive of the amount claimed in this action.

Sometime prior to his death Andreas M. Miller wrote a

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letter addressed to his wife and placed it in the hands of Hon. P. Henry Dugro with instructions to deliver it to his wife after his death. The letter is as follows:

"DEAR ANNIE.— This is intended to reach you after my demise and it will then be proper for you to advise the Equitable Trust Company, No. 37 Wall St., New York City, to thereafter remit the interest and income 'account the Miller Trust of March 11, 1907,' as and when collected, to your address.

"Yours,

"A. M. MILLER."

This letter was delivered to Annie E. Miller after her husband's death.

On June fourth Mrs. Miller wrote the plaintiff from Duluth requesting compliance on its part with the provisions of the trust agreement and on June eighth Mr. Babcock, trust officer of the plaintiff, wrote her inclosing a check for \$534.60, "being net income due you as beneficiary of the trust," excusing the delay in sending the same as caused by a misunderstanding on the part of its bookkeeper, and adding, "We will, in the future, make the payment of the income to you as collected."

On July seventh Mrs. Miller telegraphed the plaintiff, "Why is money not sent?" and on the ninth of the same month Mr. Snyder, assistant secretary of plaintiff, wrote her acknowledging the receipt of the telegram and informing her that the income due her had been forwarded to her on July sixth.

The remittance made on July sixth amounted to \$8,959.50, and, together with the previous remittance of \$534.60, made up the total amount of income received for the six months, January to July, after the deduction of the trustee's stipulated compensation. Five hundred and forty dollars of the income for the period was received June first and the remaining \$9,050 July first. No part thereof matured during the lifetime of Andreas M. Miller.

Subsequent to these two payments, made in compliance with the literal provisions of the trust agreement, and under date of July twenty-seventh, the United States Trust Company, as executor of the will of Andreas M. Miller, wrote

the plaintiff asking information as to the amount of income which accrued on the trust prior to Mr. Miller's death, and on the following day the plaintiff wrote Mrs. Miller: "We are now advised by counsel that the interest on the various securities held under the deed of trust from the date of the last collection of interest to the date of Mr. Miller's death, viz: May 22, 1917, is rightfully due and payable to the Executors," etc., adding that on June 7, 1917, they paid her \$534.60 and on July 6, 1917, \$8,959.50, or a total of \$9,494.10, of which amount \$7,826.42 was due the executors of the estate of her husband and requested her to forward to them her check for that amount.

Thereafter on November 15, 1917, the plaintiff brought this action for an accounting setting forth the payments made to Andreas M. Miller in his lifetime, and to his widow after his death, and praying judgment that the accounts be taken, passed upon and judicially settled, and the plaintiff directed to hold the principal of said trust as formerly, and pay the income to the life beneficiary.

The defendant, Annie E. Miller, answered admitting all the allegations of the complaint and joined in the prayer of the plaintiff for judgment.

Of the income received subsequent to July, 1917, the plaintiff as shown by its second amended and supplemental complaint, omitted to pay to Mrs. Miller the sum of \$8,903.75, and in its said complaint alleges that both Annie E. Miller and the United States Trust Company "claim that the income accrued on said trust fund to May 22, 1917, but not received until after that date should be paid to him."

The defendant, Mrs. Miller, denied that allegation, and alleged that this income had been paid to her by the plaintiff as provided in the trust agreement, and that there was no income which accrued on said trust fund to May 22, 1917, in the hands of the plaintiff and alleged that she was entitled under the terms of the trust agreement to the income paid her in June and July, 1917, and that plaintiff has refused to pay to her income received by it since July, 1917, which should have been paid over to her as and when received.

The learned court at Special Term found that the payments of June 7 and July 6, 1917, were voluntarily made by plaintiff

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to Annie E. Miller, with full knowledge of the facts, as and in compliance with its obligation set forth in the trust agreement; and further that the plaintiff has withheld from the defendant the interest and income down to January 1, 1918, amounting to \$7,316.10, and out of the interest and income down to July 1, 1918, the sum of \$515.52, together making up the sum of \$7,826.42, being the amount claimed by the United States Trust Company of New York, as executor of Andreas M. Miller, and claims the right to withhold from said Annie E. Miller, from interest and income accruing and received subsequent to July, 1917, an amount equal to the amount of the accrued income down to the date of the death of Andreas M. Miller, and out of subsequent accruing income was retained the further sum of \$1,077.33, making in all the sum of \$8,903.75.

The court held, as conclusions of law:

" I. That the Equitable Trust Company of New York, the plaintiff herein, as trustee under said deed of trust, in good faith and believing that she was entitled thereto, paid over to the defendant Annie E. Miller the sum of Seven thousand eight hundred seventy-one 54/100 dollars (\$7,871.54) as appears in Schedule C-2 of the account filed herein, said payment being the amount of interest and income accrued on said trust fund to May 22, 1917, less the amount of trustee's commissions thereon.

" II. That the United States Trust Company of New York, as executor of the last will and testament of Andreas M. Miller, deceased, was and is entitled to receive said sum of Seven thousand eight hundred seventy-one 54/100 dollars (\$7,871.54) being the amount of interest and income accrued on said trust fund to May 23, 1917, less the amount of the trustee's commissions thereon, with interest from July 6, 1917.

" III. That the defendant Annie E. Miller was not entitled to receive said sum of Seven thousand eight hundred seventy-one 54/100 dollars (\$7,871.54).

" IV. That the plaintiff herein, The Equitable Trust Company of New York, as trustee, is entitled to reimburse itself as trustee for the amount of said payment due to the United States Trust Company of New York, as executor of the last will and testament of Andreas M. Miller, deceased, in the

sum of Seven thousand eight hundred seventy-one 54/100 dollars (\$7,871.54) out of any income subsequently accruing on said trust fund and payable to the defendant Annie E. Miller.

"V. That the plaintiff, The Equitable Trust Company of New York, as trustee, should, out of the balance of income remaining in its hands as shown by said account, pay to the United States Trust Company of New York, as executor of the last will and testament of Andreas M. Miller, deceased, the sum of Seven thousand eight hundred seventy-one 54/100 dollars (\$7,871.54) and should pay the balance of said income to Annie E. Miller, the present life beneficiary of said trust fund."

"VIII. That the defendant Annie E. Miller is entitled to receive only the income accruing on said trust fund and received by the plaintiff from and after May 22, 1917, the date of death of said Andreas M. Miller, excepting, however, such amounts thereof as may be necessary to reimburse the plaintiff for any payment made to the United States Trust Company of New York as executor as aforesaid."

The aggregate amount paid over to Annie E. Miller on June 7 and July 6, 1917, amounted to \$9,494.10, representing six months interest, amounting to \$540, paid June first on Dayton Water Works bonds and six months interest, amounting to \$9,050, on other municipal bonds, less the trustee's commission of one per cent.

The question is whether \$7,871.54 (or so much of said \$9,494.10 as represents interest accrued to May 22, 1917, the date of the death of Andreas M. Miller) is payable under the terms of the trust to the estate of Andreas M. Miller, or whether it was properly paid to Annie E. Miller, as succeeding beneficiary for life.

The respondent contends that the directions to the trustee are only capable of three possible constructions:

A. A direction that the interest be apportioned between the two life tenants according to the usual rule of law.

B. A direction ambiguous as to whether the testator intended that the entire interest maturing after the death of the first life tenant should be paid by the trustee to the second life tenant.

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C. An unambiguous direction amounting to an express stipulation that the entire interest maturing after the death of the first life tenant should be paid by the trustee to the second life tenant.

It further contends that on principle and on authority the estate of the first life tenant is clearly entitled to the interest accrued at the time of his death under any one of the three possible constructions.

The appellant contends that the whole scheme of Andreas M. Miller, and the circumstances surrounding its execution and mode of operation, show that his dominant purpose was to divide his property into four parts, intended to provide a continuous income measured to the respective needs, present and future, of himself and each member of his family having claims upon his bounty, or entitled to proper provision for support and maintenance and that each should have and enjoy the income of the allotted share continuously from the time of division by creation of the trusts. This scheme and purpose, it is urged, preclude the idea of intention that there should be an accumulation of income under either of the trust agreements, and, if carried out according to his declared intention, no accumulation under either thereof was possible. Therefore, it follows that the interest collected during Mr. Miller's life was to be paid to him; that received after his death was, as and when received, to be paid to Mrs. Miller.

Taking up first a possible construction of the trust agreement that it directs that the entire interest maturing after the death of the first life tenant should be paid by the trustee to the second life tenant, this would amount to an accumulation prohibited by the statute of this State (Pers. Prop. Law, § 16, as amd. by Laws of 1915, chap. 670). In *United States Trust Co. v. Tobias* (21 Abb. N. C. 392) it was held that income derived from personal property should be apportioned as of the date of the death of the life tenant and that her executors were entitled to such portion as accrued up to that time, citing with approval Perry on Trusts (Vol. 2 [2d ed.], p. 102), where it was laid down that "interest money upon notes, bonds, mortgages and similar securities accrues from day to day, although it is not payable until a fixed day. It is, therefore, apportionable and trustees must pay the proportion accruing

during the life of the tenant for life to his representatives." In *Matter of Lamb* (182 App. Div. 180; *affd.*, without opinion, 224 N. Y. 577) it was held that an express direction to the trustee to pay the principal "together with all interest and income earned and accrued and unpaid" upon the death of the life tenant to the remaindermen was an attempted direction to accumulate and was void. The language of the direction to the trustee in that case was to "collect and receive the interest and income \* \* \* and pay over the same in semi-annual instalments, to \* \* \* Sarah \* \* \* for and during her natural life, and upon her decease to pay over the principal of said Trust Fund, together with all interest and income earned and accrued and unpaid, to my brothers Henry Elmer Gibb and Lewis Mills Gibb, share and share alike, whereupon said Trust shall cease and determine." Mrs. Sarah M. Gibb died December 27, 1916.

It was found that the trust fund had been loaned on interest, payable semi-annually, to a firm, as authorized by the testator, and that interest amounting to \$4,846.15 was due and payable to the trustees January 31, 1917 (said date being the next date of the maturity of the semi-annual interest payments following the death of the life tenant).

The court held that so much of the \$4,846.15 as had accrued at the date of the death of the life tenant should be paid to her estate, irrespective of the express direction to the contrary. The Appellate Division stated the question as to the statute against accumulations as follows (at p. 188): "The will directs that the trustees shall pay the principal 'together with all interest and income earned and accrued and unpaid' to testator's brothers. Does that direct an accumulation? The loan to the Loeser Company was on an arrangement, as shown by the practice, that the interest should be paid at the end of each six months. Even if interest is deemed to accrue from day to day, it is not collectible daily. The trustees could not have collected it before Mrs. Gibb died. But that is not the test. The interest was an incident of the principal and had no unrelated and independent status. Each unit of principal grows through continuing time and is owned by the person who owns the principal. Who owned the principal so increasing? The trustees did. But their title

was only to support the trust to pay to Mrs. Gibb. How could they take title to pay her and yet pay to somebody else? It is answered that they could do so because the will so directs. If so, the will gives the trustees title to the principal, among other things, for the purpose of earning money thereon during a precedent estate, to pay to the remaindermen. Now, the learned counsel for the respondent, with his usual helpful, fair presentation, says that such thing could not be done if the trustees had received the money, and that the case would then fall within *Matter of Keogh* (112 App. Div. 414). But in principle is there a distinction? The trustee has title to the interest because he has title to the principal, and his tenure is not affected because it had not been paid into his hand, or because, according to the terms of the loan, the sum is not yet collectible. The statute is not that the takers of an estate shall not accumulate by hoarding in their hands, but the law forbids accumulations, however effected, except in case of minorities. Income may accumulate by the connivance, neglect of the creditor or by convention between him and the debtor. For instance, Loeser & Co. paid the interest every six months; it might have been every year, or every two years, or at some longer period. If, now, a testator may direct that uncollected income to one person upon her death may be shifted to another, then the statute may be evaded. There cannot be a valid trust to pay one income accumulated in whatsoever way it happened when minorities are involved. So, if the testator meant to direct in effect that, if at Mrs. Gibb's death the trust fund had earned interest or income that was accrued, and the trustees had not reduced it to possession, it should follow the principal into the hands of the remaindermen, he violated the statute, because, as I have stated, there is an accumulation of income resulting merely from the fact that by agreement with the debtor the income was allowed to accumulate."

Taking up the second possible construction of the trust agreement, that the direction is ambiguous as to whether the testator intended that the entire interest maturing after the death of the first life tenant should be paid by the trustee to the second life tenant, it is well settled that where the



provisions of an instrument are capable of two constructions, the court will adopt that which will render the trust legal and operative, rather than one which will render it void. (*Arthur v. Arthur*, 3 App. Div. 375.) This brings us, therefore, to the first construction suggested, viz., that the direction to the trustee is, in intent and effect, one that the interest be apportioned between the two life tenants according to the usual rule of law. The respondent contends that this is the only logical construction of the words used; that a trustee can only pay over income when received or at periodic intervals, and that the effect of specifying that payments shall be made "when received" is that payment shall be made as soon as possible; that under the usual New York rule applicable to such interest payments, the estate of the life tenant is entitled to income accrued at the time of his death, and there is no reason to assume that a direction to pay income to the life tenant as soon as possible shows an intention that the estate of the life tenant shall be deprived of income accrued at the time of his death. The quotation heretofore made from the case of *United States Trust Co. v. Tobias* (21 Abb. N. C. 392) shows that it was there held that a direction to pay income to the life tenant for and during the natural life entitled her estate to income accrued at the time of her death on personal property, including municipal bonds as in the present case. In *Matter of Fithian* (103 Misc. Rep. 568) it was said (at p. 570): "In the absence of any expression or intimation in the will to the contrary, the interest must be apportioned according to the contention of the trustee. It is believed that the rule on this subject known to have been applicable at common law to the indebtedness of individuals and private corporations has been in modern thought extended, as in reason it should be, to the obligations of *quasi* public corporations. Clear authority on this question is wanting."

Section 2674 of the Code of Civil Procedure provides: "All rents reserved on any lease made after June seventh, eighteen hundred and seventy-five, and all annuities, dividends and other payments of every description made payable or becoming due at fixed periods under any instrument executed after such date, or, being a last will and testament that takes effect after such date, shall be apportioned so that on the death of any person

interested in such rents, annuities, dividends or other such payments, or in the estate or fund from or in respect to which the same issues or is derived, or on the determination by any other means of the interest of any such person, he, or his executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of such person, or of the determination of his or her interest, after making allowance and deductions on account of charges on such rents, annuities, dividends and other payments. \* \* \* This section shall not apply to any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description."

This section was under consideration in *Matter of Young* (23 Misc. Rep. 223). There the will of Thomas Cornell contained a direction "to pay over unto my said beloved wife Catharine Ann for her own sole use, benefit and disposition, during the period of said 'two lives' if she shall live so long, or if not, during her natural life, ninety (90%) per cent of the net income of my said estate in lieu of dower or of any rights she may have in any or to any part of my estate except as herein provided, the remaining ten (10%) per cent to revert to my estate." Mrs. Catharine Ann Cornell died May 15, 1897. In an accounting by the trustees, one of the questions involved was whether the estate of Catharine was entitled to interest earned but not due or collected by the trustee at the time of the death. The court quoted section 2720 of the Code (now section 2674) in its entirety and concluded that the earned income belonged to the estate of the life tenant, and gave the following direction (p. 227): "Then compute the amount of income (not including any dividends on stocks owned by the estate) which was earned, but not collected by the trustee on May 15, 1897, less 10 per cent thereof. Deduct from that such proportion for the expenses of the estate for the ten months less two-twelfths of taxes paid, as this income bears to the remaining income for the ten months, less 10 per cent thereof, and the remainder thus found will be the

income due Mrs. Cornell's estate, and shall be at once paid to Nellie L. Carpenter, executrix of Catharine Ann Cornell's will, in full for her interest in the estate of Thomas Cornell."

The court in discussing the effect of the Code section said (p. 228): "There seems to be no reported case construing section 2720 of the Code of Civil Procedure in which the facts are similar to the one at bar. I have given the subject careful examination, and the conclusions here arrived at are in accordance with the plain reading of the section. Some of its provisions are opposed to the principles of the common law. (2 Perry on Trusts, § 556; *Clapp v. Astor*, 2 Edwards Ch. 379; *Kearney v. Cruikshank*, 117 N. Y. 95.) It seems framed to fully meet a case similar to the one before me. Its provisions are clear, and I have construed it accordingly. Some of the income of this estate is also apportionable under the provisions of the common law, aside from section 2720, such as interest on bonds and mortgages, and other securities. (*U. S. Trust Co. v. Tobias*, 21 Abb. N. C. 393.)"

I am of the opinion that the learned court was right in holding that, in the absence of any express stipulation to the contrary, the estate of the life tenant of a trust to pay income is entitled to interest on municipal bonds, accrued but not yet payable, at the time of the life tenant's death. I conclude that the judgment should, therefore, be affirmed, with costs to all parties appearing on this appeal, payable out of the trust estate.

CLARKE, P. J., MERRELL and GREENBAUM, JJ., concur;  
LAUGHLIN, J., dissents.

LAUGHLIN, J. (dissenting):

By the trust agreement the settlor of the trust assigned and transferred to the trustee specified bonds of the aggregate par value of \$408,000, upon all but one class of which interest at specified rates became due and payable semi-annually on January first and July first and upon one class of which, aggregating \$70,000, interest became due and payable annually on the first of July. In the trust agreement immediately following the enumeration of the bonds the trustee was directed collect the interest and to pay the same "as and when

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received " to the father of the settlor during his life and upon his death to the mother of the settlor, if surviving, during her life. The father of the settlor died on the 22d of May, 1917, and the mother of the settlor survived him. The point presented for decision is whether there must be an apportionment between the mother of the settlor and the personal representative of the father of the interest which accrued on these bonds between the 1st day of January and the 1st day of July, 1917, or whether the construction of the trust agreement recognized and acted upon by the trustee in the first instance, to the effect that the mother of the settlor is entitled to all of such interest, was the proper construction. I am unable to agree with the views expressed by Mr. Justice DOWLING that the construction so heretofore given and acted upon by the trustee would be in violation of section 16 of the Personal Property Law (as amd. by Laws of 1915, chap. 670) and void as constituting an accumulation of income forbidden by subdivision 3 of said section. Technically speaking it is true, as stated in *United States Trust Co. v. Tobias* (21 Abb. N. C. 392) and *Matter of Lamb* (182 App. Div. 180), that income from personal property accumulates from day to day, and, therefore, in the absence of a direction to the contrary in a will, deed or other instrument creating a trust, there should be an apportionment of such income as of the date of the death of the life beneficiary thereof. I do not understand, however, that either the statute or the general rule to which reference has been made precludes the settlor of a trust from giving to one life beneficiary under circumstances such as are here presented the interest that falls due and becomes payable on specified securities during the life of such beneficiary, and to another the interest falling due and becoming payable thereon after the death of the first beneficiary, even though it represents income accruing in part but not becoming due or payable during the life of the former beneficiary. There is in such case no direction for the unlawful accumulation of income. I know of no decision in which it has been held that there can be a direction for the accumulation of income in violation of the statute before the income has become due and payable. If there were any doubt on that point I think it has been removed by the Legislature itself by recog-

nizing in section 2674 of the Code of Civil Procedure, in effect that the person creating a trust may provide that there shall be no apportionment in such cases. The section after prescribing the general rule for apportionment, which would be applicable were it not for the provisions of the deed of trust by which the settlor only gave the first life beneficiary the interest falling due and payable during the life of such beneficiary, expressly provides that the provisions of the section "shall not apply to any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description." It is not necessary to bring the case within the exception prescribed in that section that the precise phraseology of the section should be followed; it is sufficient, I think, if it plainly appears that the settlor or testator intended that there should not be any apportionment; and in the case at bar such intent is manifest, for the corpus of the trust consisted of municipal bonds, the interest upon which he expected would be promptly paid, and for that reason no significance is to be attached to the direction that the beneficiary was to have the interest when received by the trustee, because in the circumstances he recognized no interval between the date the interest became due and the time it would be paid to the trustee. He was not providing for the estate of the life beneficiary. His only concern was for the life beneficiary, and on that theory he gave the first beneficiary only the interest falling due and payable during his life. I, therefore, vote for reversal.

Judgment affirmed, with costs to all parties appearing on this appeal payable out of the trust estate.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WELLS & NEWTON COMPANY OF NEW YORK, Respondent, v. CHARLES L. CRAIG, as Comptroller of the City of New York, and Others, Appellants.

First Department, July 1, 1921.

**Mandamus**—writ issues only where clear legal right appears—failure to present claim to comptroller as required by Greater New York Charter, § 261, bar to application for writ—failure of relator to establish clear, legal right to writ—failure to have amount of claim audited—audit of claim by comptroller under Greater New York Charter, § 149.

A writ of mandamus issues only in that class of cases where a clear legal right is made to appear and there is no other adequate and legal means of obtaining it.

The failure to comply with section 261 of the Greater New York charter, providing in effect that no action or special proceeding shall be maintained against the city of New York unless it shall appear that at least thirty days have elapsed since the claim was presented to the comptroller and that he has neglected or refused to make an adjustment or payment thereof for thirty days after such adjustment, is a bar to an application by a contractor with the board of education of the city of New York, for a peremptory writ of mandamus requiring the comptroller of the city of New York to execute a warrant for a balance alleged to be due the relator.

The relator failed to establish a clear legal right to the writ demanded for the reason that the amount of the claim asserted by it has never been fixed, determined and audited by any competent public authority. This appears from the fact that the auditor of the board of education in his report to the board did not approve all the claim at a fixed sum, that the board of education and the board of estimate and apportionment expressly left open the question of how much was actually due and that the board of aldermen in approving and concurring in the resolution of the board of estimate and apportionment also left open the question of the amount due to the relator.

The amount to which the relator is entitled still remains to be determined by the proper auditing officer who, under the circumstances, is the comptroller of the city of New York under the provisions of section 149 of the Greater New York charter.

The fact that the comptroller voted in the affirmative on the resolution of the board of estimate and apportionment does not estop him in any way from asserting his right to audit the relator's claim, for the reason that the resolution for which he voted did not fix the amount of said claim nor audit the same.

APPEAL by the defendants, Charles L. Craig and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 11th day of March, 1921, granting relator's motion for a peremptory writ of mandamus.

*Willard S. Allen* of counsel [*John F. O'Brien*, *Arthur J. W. Hilly*, *Samuel J. Resnick* and *Harold Taylor* with him on the brief; *John P. O'Brien*, *Corporation Counsel*], for the appellants.

*Thomas F. Conway* of counsel [*Joseph A. Kellogg* and *Thomas E. O'Brien* with him on the brief; *J. Power Donellan*, attorney], for the respondent.

DOWLING, J.:

The facts upon which this proceeding is based are undisputed. On October 25, 1915, the relator entered into a contract with the board of education through its building committee, for the installation of the heating and ventilating apparatus in the Evander Childs High School, in the borough of The Bronx. The contract provided that the work of installation of the heating and ventilating apparatus should be completed within 120 days for the total sum of \$74,770, but because of various faults and defaults of the city contractors, by reason of which the city failed to have the construction of the building in which the said heating and ventilating apparatus were, by the terms of the said contract to be installed, ready for the installation of such apparatus in either a practicable or economical manner, and because of the interference with the orderly progress of the said relator's work covered by said contract, the said relator suffered great and continuing and increasing damages in progressing the said work, until June, 1918, or prior thereto, when the damages had become so great and defaults of said city so serious that the contractor quit work thereunder and refused to be further bound by the provisions of said contract and refused to go on with the work covered thereby unless and until the city should enter into a binding agreement with the said contractor to pay it its claim then and theretofore asserted for extra expenses incidental to the carrying out of

the said contract in the previous prosecution of the work thereunder and in completion of the further work covered thereby. At this time the relator had completed about two-thirds of the contract and performed work of the value of \$50,823, which sum had been paid to it. On July 3, 1918, a letter was written by the vice-president of the board of education to relator's attorney relative to the adjustment of relator's contract, in which he declined to recommend a form of supplementary agreement submitted by the attorney, for the reason that "the Board of Education is so placed that any agreed state of facts translated into terms of money might vitiate or impair the Board's future action in connection with the recovery of its losses from the sureties of defaulting construction contractors. However, I may say that no matter how tenacious the Board of Education may be in the full protection of its rights, no disposition exists on our part to treat the situation other than with a spirit of fairness towards your clients. There appears to be no question raised as to the solvency of your clients or of the Board of Education, therefore we may consider that both parties are responsible for their acts and future agreements." He thereupon proceeded to give the outlines of the resolution thereafter set forth, and this proposal was accepted by the relator which wrote that it "will resume the work to be completed under the contract, leaving the settlement of its claims for breach of contract or other claims to be settled in the manner or methods set forth above." Thereupon the board of education at its meeting on July 3, 1918, adopted the following resolution:

"WHEREAS, on October 25, 1915, the Board of Education entered into a contract with Wells & Newton Co. for the installation of heating and ventilating apparatus at the Evander Childs High School, the amount of said contract was \$74,770, upon which there has been earned and paid the sum of \$50,823, leaving a balance of work in a state of performance or being performed, amounting to \$23,947, and

"WHEREAS, the completion of the work required under the aforesaid contract has been delayed by reason of the failure of the original construction contractor to perform the work required under his contract, the original construction contractor has been declared in default and his contract void



in the interests of the Board. The completion of the construction work has been relet on three occasions owing to default in the case of two, and

" WHEREAS, the interests of the Board of Education demand that the work of construction and completion of the Evander Childs High School be carried forward without further delay, therefore be it

" *Resolved*, that the work called for in the above mentioned contraction with the Wells & Newton Co. of New York be continued under the terms of the present contract until completion, and

" *Resolved*, that the Board of Education acknowledges that by reason of such continuation of the performance of the contract, the contractors will have a claim for extra expense, the amount of which is not definable at this time, the said extra expense arising out of delays on the part of other contractors and the enhanced prices of labor and materials due to present day extraordinary conditions; and

" *Resolved*, that the Board of Education, upon the completion of the work required to be performed under the existing contract, will entertain a claim in detail and settle the same by either one of the following methods:

" 1. By agreement,

" 2. By arbitration, or

" 3. By judicial decision on an agreed state of facts, and

" *Resolved*, that the work called for under the contract be proceeded with without delay under the direction of the Superintendent of School Buildings."

Thereupon the relator resumed work, and diligently prosecuted the same to completion and the same was fully completed in or about the month of May, 1920. Because of said faults and defaults of the said city and board it was impossible to sooner complete the same. It was in reliance on said resolution and because thereof, and solely because thereof, that the relator resumed and completed said work.

Upon completion of the work the contractor submitted a claim showing the reasonable value of the work as done as \$136,913.93, being the actual cost plus ten per cent profit. Supporting affidavits and schedules were filed with the board of education, which requested from relator and received

directly from trade and contractors' associations further affidavits and statements in support of the claim.

On July 12, 1920, the board of education issued its certificate as follows:

" On behalf of the Board of Education, School District of the City of New York, it is hereby certified that the contract of Wells & Newton Co. of N. Y. For Item 1, Installing Heating and Ventilating Apparatus Work on Public School Evander Childs H. S. situated at East 184 Street and Creston Avenue Borough of The Bronx dated the 25 day of October 1915 has been fully performed and the work finished, complete and perfect in every respect and to the satisfaction of said Board, and accepted July 12, 1920.

" It is further certified that having given due consideration to the time limit of the contract an allowance of 1128 days is made for delays beyond the control of the contractor, as provided in clause J of the contract; also that the last payment under said contract is now due, and that all damages and allowances which should be paid or made by the contractor have been deducted from the said payment, leaving the sum of Nine thousand and ninety seven \$. . . . . Dollars due thereon.

" Dated, New York, July 12, 1920.

" BOARD OF EDUCATION

" School District of City of New York

By JOHN A. FERGUSON, *Chm.*

" Acting Chairman, Committee on  
" Buildings & Sites."

Subjoined to this certificate and a part thereof is a certificate by the relator as follows:

" *Certificate of Relator that there is no claim or demand for extra work or otherwise made with Board of Education.*

" We do hereby certify that there is no claim or demand for extra work or otherwise, under or in connection with the contract of Wells & Newton Co., of N. Y., made with the Board of Education, School District of the City of New York, for Item 1, Installing Heating & Ventilating Apparatus on Public School Evander Childs HS situated at East 184 Street and Creston Avenue Borough of The Bronx dated the 25th

day of October 1915. We do further certify that the last payment under said contract, to wit, the sum of Nine thousand and ninety seven . . . . .dollars will be in full of every claim or demand whatever in the premises, except as per our bills and schedules rendered for work done and materials furnished in conformity with Resolution of the Board of Education, dated July 3, 1918.

“WELLS & NEWTON CO. OF N. Y.,

“*Contractor.*

“By F. J. FEE, *Pres.*”

To this in turn was subjoined the certificate of the auditor of the board of education that “the above certificate is in conformity with the by-laws, rules and regulations of the Board of Education, School District of The City of New York.”

These certificates were duly filed in the office of the comptroller of the city of New York on or about July 13, 1920, and thereafter the comptroller delivered to the relator a warrant for the sum of \$9,097 as a further payment in addition to payments theretofore made on account of the work of said relator covered by said contract for the installation of the heating and ventilating apparatus in said high school, the aggregate payments made on said account, including said last payment, being \$74,770.

On July 22, 1920, the auditor of the board of education, after having received this claim and the schedules of cost, supported by affidavits of expert accountants, transmitted the entire facts, figures and claim in a report to the president of the board of education and chairman of the committee on salaries, finance and supplies.

The auditor's report, among other things, contains the following:

“This Bureau is without any evidence which we can use to offset or deny the claim, nor does it appear that it was the original intention of the Board of Education to do other than meet the situation in a fair and reasonable way.

“I would suggest that the settlement of this claim is a matter for your determination, either by an allowance in full or by some method of compromise, which might be agreed upon and acceptable to all parties concerned.

"Whatever may be the sum of settlement or allowance or agreement your Committee sees fit to make, I think it will be necessary to submit to the Board of Estimate and Apportionment a special estimate under the provisions of Subdivision 8 of Section 877 of the Education Law."

In conformity with the suggestion contained in this report of its auditor, the board of education on July 30, 1920, passed the following resolution:

"*Resolved*, that, in pursuance of the provisions of Section 877, subdivision 8, of the State Education Law, the Board of Estimate and Apportionment be, and it is hereby, requested to appropriate the sum of \$62,143.93, such appropriation or so much thereof as may be required to be used for the purpose of making payment to the Wells & Newton Company of New York of the amount found to be due and resulting from work performed at the Evander Childs High School, Borough of the Bronx, in accordance with the terms and stipulations contained in preambles and resolutions adopted by the Board of Education on July 3, 1918, the said preambles and resolutions continuing in performance a contract for the work of installing heating and ventilating apparatus at the above named school building, entered into between the Wells and Newton Company of New York, and the Board of Education on October 25, 1915."

The secretary of the board of education transmitted a copy of this resolution to the board of estimate and apportionment on July 31, 1920, together with a copy of the report of its auditor before referred to, and the board of estimate and apportionment on August 6, 1920, passed the following resolution:

"WHEREAS, the Board of Education in a communication dated July 31, 1920, made requisition upon the Board of Estimate and Apportionment for an appropriation, under the provisions of section 877, subdivision 8, of the State Education Law, of sixty-two thousand one hundred and forty-three dollars and ninety-three cents (\$62,143.93), such appropriation, or so much thereof as may be required, to be used for the purpose of making payment to the Wells & Newton Company of New York of the amount found to be due and resulting from work at the Evander Childs High School, Borough of the Bronx, in performance of a contract

for the work of installing heating and ventilating apparatus at said named school building; therefore, be it

"Resolved, that the Board of Estimate and Apportionment, pursuant to the provisions of subdivision 8 of section 877 of the State Education Law, as amended by chapter 786, Laws of 1917, and predicated upon the requisition of the Board of Education dated July 31, 1920, hereinabove referred to, does hereby appropriate, subject to the approval of the Board of Aldermen, the sum of sixty-two thousand one hundred and forty-three dollars and ninety-three cents (\$62,143.93), and when the approval of the Board of Aldermen shall have been obtained therefor the Comptroller be and he hereby is authorized to issue special revenue bonds in an amount not exceeding sixty-two thousand one hundred and forty-three dollars and ninety-three cents (\$62,143.93); said special revenue bonds to be issued in accordance with the provisions of section 187 of the Greater New York Charter\* and the proceeds to the amount of the par value or as much thereof as shall be required, to be used to pay whatever claim may be found in favor of the Wells & Newton Company under the provisions of law relating to the audit and payment of salaries and other claims by the Department of Finance; and such amount as may thus be paid, not exceeding the amount herein authorized, shall be included as a separate item in the annual estimate of the Board of Education for the year 1921 in accordance with the requirements of section 877, subsection B, of the State Education Law as amended.†"

All the votes at the meeting (16) were cast in favor of this resolution, including the mayor and comptroller. A certified copy of the resolution was sent to the board of aldermen on August 12, 1920, and the board of aldermen on August 17, 1920, adopted a resolution as follows: "Resolved, that the Board of Aldermen hereby approves of and concurs in the following resolution adopted by the Board of Estimate and Apportionment at a stated meeting held August 6, 1920," which resolution then incorporated therein *in hæc verba* the above-quoted

\* See Laws of 1901, chap. 466, § 187, as amd. by Laws of 1910, chap. 683.—[REP.]

† See Education Law, § 877, subd. 1, ¶ b, as added by Laws of 1917, chap. 786.—[REP.]

resolution theretofore adopted by the board of estimate and apportionment.

The resolutions of the board of estimate and the board of aldermen were duly approved by the mayor on August 19, 1920. On August 24, 1920, a payment voucher and final certificate were filed in the comptroller's office which showed the sum of \$62,143.93 due the relator, referred to the above-mentioned resolutions of the board of education and of the board of estimate and apportionment and of the board of aldermen and the approval of the mayor, and had attached thereto the relator's statement of cost and various supporting affidavits, schedules and letters. It also contained a certificate of the examiner of the board of education to the effect that the prices were reasonable and just and that the calculations and extensions were correct, and a certificate of the auditor of the board of education and its chief clerk, certifying to the examination and audit of the bill of the relator in the amount of \$62,143.93 and that the bill "is chargeable to the funds of the Board of Education \* \* \* and it is further certified that the annexed bill is in conformity with the State Education Law and the by-laws and regulations of the Board of Education."

This proof of full performance, completion and acceptance, and the final certificate and payment voucher, showing the same, were duly filed in the office of the comptroller on or prior to August 24, 1920.

The comptroller and the mayor refused thereafter, although frequent demand was made upon them, to deliver a duly executed warrant to the relator for the said \$62,143.93 or any part thereof, but refused to assign any grounds or reason for withholding said payment and the relator has never been paid any portion thereof, although the heating and ventilating apparatus installed by it are and for many months last past have been in use by the city of New York and the board of education for school purposes, such use having begun prior to August 24, 1920.

The answering affidavit of the comptroller of the city of New York does not dispute any of the facts set forth in the moving affidavit. It sets forth in full the provisions of section J of the original contract between the relator and the board

of education, also that no claim had been presented to the comptroller by the relator as required by section 261 of the Greater New York charter; that no new contract had been made between the parties which complied with the provisions of section 419 of the charter; that if this was not a new contract, then it was an attempt to pay the relator a sum in excess of the contract price for its work and was violative of article 3, section 28, of the Constitution of the State of New York; and finally that if relator has a valid claim, enforceable despite the provisions of section J of the contract, such claim cannot be adjusted by the board of education, but must be presented for allowance and audit to the comptroller, in accordance with the provisions of section 149 of the Greater New York charter, and if such claim be not allowed, the relator must then, if it desires to press the claim, proceed against the city in an action at law. The comptroller's affidavit concludes by saying: "By reason of the matters heretofore set forth in its affidavit, your deponent, as the Comptroller of The City of New York, has refused to pay the vouchers transmitted to him, as such Comptroller, by the Board of Education, because said vouchers cannot be legally allowed and paid by your deponent unless and until a claim be presented and examined into and allowed by your deponent in the manner set forth and provided under sections 149 and 261 of the Greater New York Charter."

The order appealed from directed the issuance of a peremptory writ of mandamus requiring the comptroller of the city of New York to execute a warrant of the city of New York for the sum of \$62,143.93, with interest thereon at six per cent from September 23, 1920, to date of delivery of said warrant, and upon countersignature of said warrant by the mayor of the city of New York, to deliver the same to the relator, and also requiring the mayor of the city of New York to countersign said warrant before delivery thereof by the said comptroller to the relator, in payment of the balance of relator's claim against the city of New York for the installation by it of the heating and ventilating apparatus in Evander Childs High School in the borough of The Bronx.

The general rule is well settled that the writ of mandamus issues only in that class of cases where a clear legal right is

made to appear and there is no other adequate and legal means of obtaining it. (*People ex rel. McMackin v. Board of Police*, 107 N. Y. 235; *People ex rel. McCabe v. Matthies*, 179 id. 242.) The relator contends that it has brought itself within this rule and that its right to payment by the city of the amount for which the warrant was directed to be executed, namely, \$62,143.93, with interest, is clear. It contends that, the amount in question having already been found due as the result of an audit by the board of education, which fixed the amount of the claim, and such fixation having been ratified by the action of the board of estimate and apportionment and the board of aldermen, no further audit is required, nor has the comptroller any power to settle and adjust the claim of the relator.

At the outset the objection is raised that this proceeding cannot be maintained because the provisions of section 261 of the Greater New York charter (Laws of 1901, chap. 466, as amd. by Laws of 1912, chap. 452) have not been complied with. That section reads as follows:

"§ 261. No action or special proceeding, for any cause whatever, shall be prosecuted or maintained against the city of New York, unless it shall appear by and as an allegation in the complaint or necessary moving papers that at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the comptroller of said city for adjustment, and that he has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment; \* \* \*."

Concededly, no such claim ever has been presented by the relator in compliance with this section. The relator contends that this does not apply to a mandamus proceeding against officials of the city but only in an action or special proceeding against the city itself, and that as no relief against the city is prayed for and none is granted under the order from which the present appeal is taken, that section is inapplicable. Further, that the very purpose of resorting to mandamus was to avoid the delay of filing the claim and waiting for action thereon by the comptroller. But that,



in my opinion, does not meet the objection. The city of New York is a party defendant in this proceeding and the effect of the writ of mandamus issued herein against its mayor and comptroller is to require the payment by the city of the amount claimed. It is the city which is the real party in interest herein and the acts of its officials required to be done directly affect it. It is an unexpended balance of the proceeds of revenue bonds authorized to be issued, which balance is still in the city treasury, which is sought to be applied to the payment of the relator's claim and the allegation in the moving affidavit is that unless such balance is applied to the payment of the relator's claim it may be applied by the city to the payment of other obligations owing by it.

The purpose of this section of the charter was a most salutary one, providing the city's chief financial officer with an opportunity of investigating all claims sought to be enforced against the city, giving him a reasonable time for his investigation and thus preventing imposition and fraud.

Nor do I believe that the votes cast by the mayor and comptroller at the meeting of the board of estimate and apportionment at which action was taken upon the requisition of the board of education in any way estop them or the city from urging this section of the charter for the reason, as will be shown later in this opinion, that the amount of relator's claim was not definitely fixed by any action then or theretofore taken.

My conclusion, therefore, is that section 261 of the charter is a bar to the present application.

But there is a further objection to the granting of the writ herein which goes to the very substance of the controversy between the parties. The city contends that the agreement between relator and the board of education relied upon by the former may be claimed to constitute either a new contract between the parties for the completion of the work which the relator had agreed to perform but had abandoned, in which event such contract was illegal and void, *first*, because there was no good or valuable consideration therefor; *second*, because it was not made in accordance with the provisions of section 419 of the Greater New York charter (as amd. by Laws of 1910, chap. 554); *third*, because it was not made in accord-

ance with the provisions of subdivision 8 of section 875 of the Education Law, as added by chapter 786 of the Laws of 1917. If, on the other hand, it is not a new contract but is a modification of the original contract between the parties, then, it is claimed by the city, that this constitutes an attempt to pay the contractor a sum in excess of the contract price as additional compensation for the work which it had agreed to perform and, therefore, is violative of article 3, section 28, of the Constitution of the State of New York. As I view the argument made by the learned counsel for the relator, however, this new agreement is regarded by them as a modification solely of the original contract and not as a new and independent contract between the parties.

The fundamental objection to the relator's right to the writ of mandamus is the fact that it has failed to establish a clear legal right to the writ demanded and this for the reason that the amount of the claim asserted by it has never been fixed, determined and audited by any competent public authority. This appears from the following facts: *First*, The auditor of the board of education in his report to the board, which was the basis for its action, did not approve the fixation of the amount of the claim at \$136,913.93, but said:

"This Board is without any evidence which we can use to offset or deny the claim, nor does it appear that it was the original intention of the Board of Education to do other than meet the situation in a fair and reasonable way.

"I would suggest that the settlement of this claim is a matter for your determination, either by an allowance in full or by some method of compromise, which might be agreed upon and acceptable to all parties concerned."

"Whatever may be the sum of settlement or allowance or agreement your Committee sees fit to make, I think it will be necessary to submit to the Board of Estimate and Apportionment a special estimate under the provisions of Subdivision 8 of Section 877 of the Education Law."

It will be seen that this report of the auditor did not approve nor recommend its payment in full.

*Second.* The board of education, upon receipt of this report, passed the resolution requesting the board of estimate and

apportionment to appropriate the sum of \$62,143.93, "such appropriation or so much thereof as may be required to be used for the purpose of making payment to the Wells & Newton Company of New York of the amount found to be due and resulting from work performed at the Evander Childs High School, Borough of the Bronx, in accordance with the terms and stipulations contained in preambles and resolutions adopted by the Board of Education on July 3, 1918, the said preambles and resolutions continuing in performance a contract for the work of installing heating and ventilating apparatus at the above named school building, entered into between the Wells and Newton Company of New York and the Board of Education on October 25, 1915."

It will be seen that this resolution of the board of education so far from fixing the amount due to the relator expressly left open the question of how much was actually due, and while it requests the appropriation of a fixed sum it did not request that all of it be paid to the relator, but on the contrary provided that so much thereof as might be required be used for the purpose of making payment of the amount found to be due. This action of the board of education, therefore, far from being an audit of the relator's claim still left the question of the actual amount due open for future fixation in the manner provided by law.

*Third.* The board of estimate and apportionment, when it favorably acted upon the request of the board of education for the issuance of special revenue bonds in the amount of \$62,143.93, provided "said special revenue bonds to be issued in accordance with the provisions of section 187 of the Greater New York Charter and the proceeds to the amount of the par value or as much thereof as shall be required, to be used to pay whatever claim may be found in favor of the Wells & Newton Company under the provisions of law relating to the audit and payment of salaries and other claims by the Department of Finance; and such amount as may thus be paid, not exceeding the amount herein authorized, shall be included as a separate item in the annual estimate of the Board of Education for the year 1921 in accordance with the requirements of section 877, subsection B, of the State Education Law as amended."

Thus the board of estimate and apportionment, far from fixing the amount due to relator under its contract, expressly left open the question of the amount to be paid and provided specifically that whatever was found due should first be determined under the provisions of law relating to the audit and payment of salaries and other claims by the department of finance.

*Fourth.* When the board of aldermen approved and concurred in the resolution of the board of estimate and apportionment, it did so in the exact language of the resolution of the latter board and thus again left open the question of the amount due to the relator to be determined and fixed by the proper public officials.

It thus appears that the relator's claim has never, in fact, been audited, fixed and determined at any amount by any public official or board. The amount to which it is entitled, if any, still remains to be determined by the proper auditing officer who, under the facts hereinbefore set forth, it seems to me is clearly the comptroller of the city of New York under the provisions of section 149 of the Greater New York charter (as amd. by Laws of 1917, chap. 401).

The learned counsel for the relator contends that in the present matter the comptroller is but a ministerial officer charged with the duty of drawing a warrant against the sum appropriated for the specific purpose of making payment to the relator of the amount found to be due; but there never yet has been any amount found to be due to relator and, therefore, this contention is without force.

Nor does the fact that the comptroller voted in the affirmative on the resolution of the board of estimate and apportionment hereinbefore quoted estop him in any way from asserting his right to audit the relator's claim herein for the reason that the resolution for which he voted did not fix the amount of the relator's claim nor audit the same, but on the contrary left the audit thereof to the ordinary legal procedure which would have involved the reference of the claim in due course to him for audit. This action would have given him the right to examine the claim and obtain such information in addition to that tendered by the relator as would have enabled him to determine whether or not the claim was a proper one

and to exercise his power of audit accordingly. The relator has never complied with any of the requirements of law to compel or warrant the audit of its claim by the comptroller.

It follows, therefore, that the relator having failed to establish a clear legal right to the payment in question is not entitled to a writ of mandamus and that the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion for a mandamus denied, with fifty dollars costs.

CLARKE, P. J., SMITH, PAGE and GREENBAUM, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion denied, with fifty dollars costs.

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THE NEW YORK TRUST COMPANY, Plaintiff, *v.* PORTLAND RAILWAY COMPANY and PORTLAND RAILWAY, LIGHT AND POWER COMPANY, Defendants.

First Department, July 1, 1921.

**Mortgages — sinking fund provision of railroad mortgage or deed of trust construed — “after” defined — “bonds outstanding” defined — practical construction of agreement by parties recognized by court.**

The sinking fund provision in a railroad mortgage or deed of trust executed by the defendant to the plaintiff as trustee, after providing for the payment of specified amounts annually based upon the issue of a certain amount of first and refunding bonds, provided as follows: “On the first day of November in any year if a greater amount of the first and refunding bonds than five million nine hundred and eighty-two thousand dollars face value issued hereunder shall be outstanding the annual sinking fund payments due from November 1st, 1907, to November 1st, 1909, inclusive, shall be increased by a sum equal to five-twelfths of one per cent. of the amount of *bonds outstanding* [italics by court] in excess of \$5,982,000 and the annual sinking fund payments due from November 1st, 1910, to November 1st, 1919, inclusive, shall be increased by a sum equal to two-thirds of one per cent. of such excess and the annual sinking fund payments due *after November 1st, 1920* [italics by court], shall be increased by a sum equal to one per cent. of such excess.”

Held, that the word “after” was intended to mean “on and after” November 1, 1920, and that the defendant was obligated to make a

payment to the sinking fund on said date calculated on the basis of one per cent;

That the words "bonds outstanding" include those in the sinking fund, and, therefore, all bonds purchased with sinking fund moneys forming part of said fund should be included in calculating the amount to be paid by the defendants to the plaintiff as trustee.

The practical construction by the defendants of the sinking fund provision for a period of thirteen years should be considered by the court in construing said provision.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*Sherwood E. Hall* of counsel [*Hornblower, Miller & Garrison*, attorneys], for the plaintiff.

*Walter K. Earle* of counsel [*Joseph S. Clark* with him on the brief; *Sherman & Sterling*, attorneys], for the defendants.

GREENBAUM, J.:

The controversy involves the construction of a railroad mortgage or deed of trust executed by the defendant Portland Railway Company to the plaintiff as trustee and particularly of that portion of the instrument which deals with provisions thereof requiring stated sinking fund payments to be made by the mortgagor.

The defendant Portland Railway Company, incorporated in 1905 under the laws of the State of Oregon, was the owner of a street railway system in the city of Portland, Ore. On April 30, 1908, it conveyed all of its properties and franchises to the defendant the Portland Railway, Light and Power Company.

The aggregate amount of bonds authorized under the mortgage was \$10,000,000 and it was contemplated that the initial issue should be limited to \$5,982,000.

After the initial issue of upwards of \$5,000,000 of bonds, there were issued additional bonds aggregating \$2,541,000, thus making a total issue of the first refunding bonds prior to November 1, 1920, in the principal sum of \$8,523,000, of which on November 1, 1920, \$988,000 in amount were in the sinking fund.

It appears from the submission that "shortly before

November 1, 1920, the question arose between the parties as to the amount of the payment into the sinking fund which would be due on that date." The defendants claimed that only \$60,000 was payable on that day and that no additional payment would then be due, and further that the bonds held in the sinking fund should not be included in calculating the amounts due upon the specified percentages. On October 28, 1920, the defendant Portland Railway Company paid to the plaintiff as said trustee the sum of \$60,000 on account of the sinking fund in accordance with the provisions of section 1 of article 4 of the said mortgage. This payment was made and received without prejudice either to the rights of the plaintiff to claim and demand additional payment or to the rights of the defendants to a restatement of the account and a claim to a refund because of previous overpayments through not deducting sinking fund bonds in calculating the percentage.

It also appears from the submission that on November 19, 1920, plaintiff demanded of the defendants "the further sum of \$25,410 as an additional payment to the sinking fund due to it as of November 1, 1920, together with interest thereon at the rate of 6 per cent. per annum over and above the payment of \$60,000 which had been previously paid. The payment of the \$25,410 was demanded as being one per cent. of the total bonds issued on November 1, 1920, in excess of \$5,982,000 including the sinking fund bonds previously purchased;" that the defendants declined to pay the sum of \$25,410 so demanded, "upon the grounds as set forth in said refusal that, (1) the only payment required by said sinking fund on November 1, 1920, was the said sum of \$60,000, which they had previously paid, and (2) if any excess payment would be due under the mortgage it would not be the sum of \$25,410, but would be 1% upon the total amount of bonds issued and still outstanding in excess of \$5,982,000, not including the bonds purchased and paid for with sinking fund moneys."

It also appears that cash payments have been made up to November 1, 1920, to the plaintiff as trustee in annual amounts, which in each instance equalled the fixed sum plus the percentage on all bonds then issued in excess of \$5,982,000. In other words, there was no question whatever raised until

November 1, 1920, that it was the duty of the defendants to make these payments as just stated.

Two questions are presented: (1) Whether the sinking fund payment due on November 1, 1920, was limited by the terms of the mortgage to \$60,000, and (2) whether the annual payments to the sinking fund based upon a percentage of the amount of outstanding bonds in excess of the initial issue of bonds include bonds held in the sinking fund.

The controversy involves an interpretation of what is known as the "sinking fund provision," known as article 4, section 1, of the trust mortgage, which in part reads as follows:

"Section 1. The railway company covenants and agrees to pay in cash to the trustee for and on account of a sinking fund for the retirement of the first and refunding bonds, on or before the first day of November, 1907, not less than twenty-five thousand dollars and thereafter to pay annually on the first day of November in each year, until and including the first day of November, 1909, not less than twenty-five thousand dollars and to pay on the first day of November, 1910, not less than forty thousand dollars and thereafter on the first day of November in each year until and including the year 1919 to pay not less than forty thousand dollars and on the first day of November, 1920, to pay not less than sixty thousand dollars and thereafter on the first day of November in each year until the maturity or final payment of all the first and refunding bonds issued hereunder to pay not less than sixty thousand dollars.

"The above specified amounts are based upon the issue of five million nine hundred and eighty-two thousand dollars face value of first and refunding bonds. On the first day of November in any year if a greater amount of the first and refunding bonds than five million nine hundred and eighty-two thousand dollars face value issued hereunder shall be outstanding the annual sinking fund payments due from November 1st, 1907, to November 1st, 1909, inclusive, shall be increased by a sum equal to five-twelfths of one per cent. of the amount of *bonds outstanding* [italics ours] in excess of \$5,982,000 and the annual sinking fund payments due from November 1st, 1910, to November 1st, 1919, inclusive, shall be increased by a sum equal to two-thirds of one per cent. of such excess and



the annual sinking fund payments due *after November 1st, 1920* [italics ours], shall be increased by a sum equal to one per cent. of such excess.

"The trustees shall from time to time, by private purchase from brokers, or otherwise, invest the moneys in the sinking fund in the purchase of first and refunding bonds at such prices as the railway company shall deem reasonable, not exceeding the face value of said bonds, plus five per cent. premium and accrued interest. \* \* \* All bonds so purchased or drawn for the sinking fund shall be retained without cancellation as a part of the sinking fund and the interest on such bonds shall be paid by the railway company as it shall become due, in addition to the annual payments for the sinking fund herein required; and such interest, when and as paid, shall be held and invested in like manner as the other moneys in said sinking fund. \* \* \*"

The italicized words in the foregoing excerpt are responsible for the controversy between the parties.

The first ground upon which the defendants relied in refusing to pay plaintiff's demand is based upon the following words in the provision above quoted in which the word "*after*" has been italicized: "And the annual sinking fund payments due *after* [italics ours] November 1st, 1920, shall be increased by a sum equal to one per cent. of such excess." The defendants argue that the word "*after*," before the words "November 1st, 1920," indicates that no payment was to be made to the sinking fund on that date.

Removed from its context, there is plausibility in arguing that the word "*after*" excludes November 1, 1920. But the phrase immediately preceding the one relied upon speaks of "annual sinking fund payments" due from November 1, 1910, to November 1, 1919, inclusive, shall be increased by a sum equal to two-thirds of one per cent of such excess (*i. e.*, the amount above \$5,982,000), thus indicating that after November 1, 1919, a new annual percentage rate was to prevail, to wit, one per cent. We have thus an apparent ambiguity in the use of the word "*after*," if the strict construction which defendant urges is to be given to it. Such a definition of "*after*" seems to be an apparent contradiction to the scheme of annual payments outlined in the sinking

fund paragraph. No reason appears why a year's payment should be arbitrarily eliminated from a plan apparently providing for an unbroken continuity of annual payments.

The word "after," according to lexicographers and courts, has a very elastic meaning and should be determined from its context. In *Connelly v. O'Brien* (166 N. Y. 408) the court in construing a will said: "The adverbs of time, therefore, such as *when*, *then*, *after*, *from* and *after*, etc., in a devise of a remainder limited upon a life estate, are construed to relate merely to the time of the enjoyment of the estate and not to the time of its vesting in interest."

In *Bouvier's Law Dictionary* (Vol. 1 [Rawle's Rev.], p. 113), "after" is thus defined: "There is no invariable sense, however, to be attached to the word, but like 'from,' 'succeeding,' 'subsequent' and similar words, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations and is used in different senses, as it will in the particular case effectuate the intention of the parties. Its true meaning must be collected from its context and subject-matter in any particular case."

In *Sands v. Lyons* (18 Conn. 27) the court said: "The word 'after' which is used in the devise we are considering, like 'from,' 'succeeding,' 'subsequent' and similar words, where it is not expressly declared to be exclusive or inclusive is susceptible of different significations and is used in different senses, and with an exclusive or inclusive meaning, according to the subject to which it is applied. \* \* \* Its true meaning, therefore, in a particular case, must be collected from its context and subject-matter, which are the only means by which the intention is ascertained."

The idea which runs through the sinking fund provisions is that the payments were to be made annually. It is evident that the intention of the parties to the instrument was that November first should be included and not excluded. The word "after" was clearly intended to mean "on and after" November 1, 1920.

We are of opinion that the defendants were obligated to make a payment to the sinking fund on November 1, 1920, calculated on the basis of one per cent.

The remaining question calls for an interpretation of the

term "bonds outstanding" as used in the sinking fund article. The defendants claim that the words "bonds outstanding" include only bonds outstanding in the hands of the public and not those which have found their way into the sinking fund. In support of this contention defendants lay stress upon the opening portion of article 4, which reads as follows: "The railway company covenants and agrees to pay in cash to the trustee for and on account of a sinking fund for the *retirement* [italics ours] of the first and refunding bonds," etc. It is argued that the word "retirement" means what it says, that is, that the bonds were to be retired and having been retired that they may no longer be deemed outstanding. That is to say, we are to assume that the moment a bond is purchased by the trustee for the sinking fund it becomes extinct, dead, a mere piece of waste paper, valuable perhaps only as evidence that it once existed, but which has been fully discharged. This reasoning is more subtle than convincing in view of the dictionary meaning of the word "outstanding," the obvious purpose of the sinking fund and the clear intention of the parties contrary to defendants' contention gathered from various portions of article 4.

The Oxford Dictionary defines "outstanding" as follows: "that stands over or continues in existence, that remains undetermined, unsettled or unpaid."

The Century Dictionary defines "outstanding" thus: "To stand over; remain untouched, unimpaired, unsettled, uncollected, unpaid or otherwise undetermined; as *outstanding* contracts."

Its precise meaning, however, must depend upon the circumstances under which it is used. So far as the general public is concerned, the bonds which came into the sinking fund may be deemed as retired and, therefore, not outstanding, since they are not available for purchase. But so far as the sinking fund is concerned, which was created for the greater security of the bondholders, the bonds have not ceased to exist, as will appear from the following extract from article 4 above quoted: "All bonds so purchased or drawn for the sinking fund shall be retained without cancellation as a part of the sinking fund, and the interest on such bonds shall be paid by the railway company as it shall become due, in addition

to the annual payments for the sinking fund herein required; and such interest, when and as paid, shall be held and invested in like manner as the other moneys in said sinking fund."

Here we have an unequivocal declaration that the bonds in the sinking fund shall be retained without cancellation and that interest thereon shall be paid by the defendants. It is highly improbable that a bond is to be regarded as retired within the meaning given to that by defendants when it is not to be canceled and when interest is to be paid thereon.

A similar situation to that here presented was considered in *Columbia G. & E. Co. v. Knickerbocker Trust Co.* (152 App. Div. 5, 9, 10) in which the court in construing the words "then outstanding" used the following language, which is quite *apropos* to the case under review: "In our opinion the proper construction of the disputed phrase, and the only one which will fully carry out the intention of the parties when the mortgage was executed, is to hold that the stipulated annual percentages should be calculated upon the whole issue of bonds intended to be secured thereby, including such as may have been purchased and retired by the trustee with the percentages already paid to it. This amounts to treating the bonds so purchased and retired as still 'outstanding' as between the plaintiff and the trustee. In other words, for the purpose of the sinking fund the bonds purchased should be treated as investments by the trustee of the accumulated and paid percentages. In fact, section 1 of article 3 expressly refers to the act of the trustee in purchasing such bonds as an investment. For any other purpose than for determining the sum upon which the percentage is to be calculated, the bonds so purchased are to be redeemed. This construction gains some support from the circumstances that it is not provided as to bonds purchased by the trustee with the sinking fund payments that they shall be 'canceled,' but only that they shall be 'redeemed.'"

There are further reasons why the defendants' contention may not prevail. The submission states that "on October 19th, 1905, Mr. F. I. Fuller, then the president of the defendant, Portland Railway Company, wrote a letter to Messrs. Redmond & Co., Bankers, who had agreed to underwrite and float the contemplated initial issue of \$5,982,000 of the said

issue of first refunding bonds, a copy of which is thereto attached and marked exhibit 'E.' " The letter exhibit "E" contains the following statement: "A sinking fund has been created under the terms of the mortgage whereby the company pays to the trustee sums not less than \$25,000 a year. \* \* \* These sums are to be invested by the trustee in the first and refunding fives if purchasable at or below 105 and interest. If not obtainable by purchase at or below 105 and interest, bonds are to be drawn by lot at that figure. *Bonds so purchased or drawn are to be kept alive in the sinking fund and the interest thereon added to the annual amount devoted to the retirement of the bonds.*" (Italics ours.)

Here we have a declaration on the part of the president of the defendant company at the time when the bonds were to be negotiated that the bonds so purchased are "to be kept alive in the sinking fund" and that the "retirement" of the bonds simply referred to a retirement which removed them from sale to outsiders.

The submission also sets forth a schedule showing the dates and amounts of cash payments which have been made by the Portland Railway Company and its successor to the trustee on account of the said sinking fund commencing on November 1, 1907, to October 28, 1920, a period of thirteen years. The payments therein referred to, except one on October 28, 1920, are the fixed sums stipulated together with the additional sums equal to the specified percentage of bonds issued in excess of \$5,982,000 as set forth in article 4 of the trust mortgage. It is admitted in the submission that "no question was raised by the company or by any party of the liability of the company to include bonds in the sinking fund in calculating the amounts due to the sinking fund based upon the specified percentages until shortly before November 1, 1920, and until shortly before November 1, 1920, the percentages have been calculated and the amounts of the payments arrived at by treating bonds purchased with sinking fund moneys and held in the sinking fund, as bonds outstanding."

We have thus a practical construction by the defendants themselves for a period of thirteen years which accords with the claim of the plaintiff. The practical construction of the parties to an agreement for many years has been recognized

by the courts as a valuable factor in construing ambiguous clauses and agreements. (*French v. Carhart*, 1 N. Y. 96; *City of New York v. New York City R. Co.*, 193 id. 543; *Syms v. Mayor, etc.*, 105 id. 153.)

We think sufficient has been indicated to warrant the conclusion that all bonds purchased with sinking fund moneys and forming part of the sinking fund should be included in calculating the amount to be paid by the defendants to the plaintiff as trustee.

There must be judgment for the plaintiff for the sum of \$25,410 with interest thereon from November 1, 1920, at the rate of six per cent.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concur.

Judgment ordered for plaintiff for \$25,410, with interest from November 1, 1920, at six per cent. Settle order on notice.

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In the Matter of the Application of THE CITY OF NEW YORK,  
Appellant, Respondent, Relative to Acquiring Title, etc.,  
to the Lands, etc., Required for the Opening and Extending  
of Inwood Hill Park, in the Borough of Manhattan, City  
of New York, etc.

INWOOD DOCK, WAREHOUSE & MARKETS CO., INC., and  
Others, Respondents, Appellants.

First Department, July 1, 1921.

**Eminent domain — acquisition of property by city of New York for park purposes — damages — determination of value of property — consideration of adaptability of property to purposes for which it could most profitably be used — damages cannot be based upon speculative and fanciful plan of improvement — reception of evidence of such plan not prejudicial where ignored by court — court governed by same rules as were formerly applied to commissioners in condemnation — award to city based on testimony of experts called by corporation counsel.**

In estimating the reasonable market value of property taken by the city of New York for park purposes, the owner is entitled to have considered the adaptability of the land to the purposes for which it could most

profitably be used, but is not entitled to have his damages based upon a plan of improvement that is speculative and fanciful.

But the reception of evidence, as to a speculative and fanciful plan for the construction of apartment houses in a lonely and inaccessible place, which was disregarded by the court, cannot be considered prejudicial, where it does not appear that it influenced the decision, and that the erroneous theory was adopted by the court, and resulted in an award which is an injustice to one party or the other.

The mere fact that the court did not accept the testimony of the city's experts as to value does not show that it was influenced by the fanciful and speculative plan presented by the claimants.

The court in these proceedings is governed by the same rules as were applied to commissioners in condemnation prior to the adoption of the amendment to the Constitution and the resulting legislation.

Where an award was made to the city for land owned by it, based upon the testimony of experts called by the corporation counsel, and no evidence to the contrary was offered, the city cannot complain upon the ground that the court did not disregard said testimony and make awards to it on the same basis as to others.

CROSS-APPEALS from a first partial and separate final decree of the Supreme Court, entered in the office of the clerk of the county of New York on the 22d day of June, 1920, upon the decision of the court rendered after a trial at the New York Special Term in condemnation proceedings.

*L. Howell LaMotte* of counsel [*Joel J. Squier* with him on the brief; *John P. O'Brien*, Corporation Counsel], for the City of New York.

*Martin Conboy* of counsel [*Harry B. Chambers* with him on the brief; *Griggs, Baldwin & Baldwin* and *Charles C. Lockwood*, attorneys], for the claimants.

PAGE, J.:

The city of New York instituted proceedings pursuant to a resolution of the board of estimate and apportionment adopted July 27, 1916, for the purpose of acquiring title to the property situated on the west slope of Inwood Hill for a park. The title to the property acquired in this proceeding vested in the city of New York on December 15, 1917, by virtue of a resolution of the board of estimate and apportionment. The first partial and separate final decree embracing the damage parcels involved in this appeal was made pursuant

to a resolution of the board of estimate adopted on April 16, 1920. Inwood Hill is bounded on the south by Dyckman street, on the west by the Hudson river, on the north by the Harlem River ship canal, and on the east by the Dyckman flats, and is formed by two ridges which are separated by a deep ravine extending south from the ship canal. The property acquired in this proceeding is situated on the west slope of the westerly ridge and extends from Dyckman street north to the ship canal. The only access to the westerly ridge is by way of the lower Bolton road, a dirt road varying in width from eighteen to twenty feet, which runs northerly from Dyckman street near the right of way of the New York Central and Hudson River railroad to the property of the Inwood Dock, Warehouse & Markets Co., Inc., which is the most northerly property taken in this proceeding. There is no access to the property by way of any of the streets running west from Broadway north of Dyckman street.

The distance between the westerly and easterly boundaries of the property acquired averages 600 feet, and there is a rise in elevation which varies from 125 to 180 feet in a distance of 600 feet.

Inwood Hill many years ago was used for residential purposes. During the past thirty years it has gradually fallen into disuse for that purpose and is now used for institutions, so far as any use is made of it. The House of Mercy, an institution to which fallen women are committed by the courts, accommodating 108 inmates, was built twenty or thirty years ago. In 1903 the New York Magdalen Home, now known as Inwood House, purchased property and erected a large building which accommodates 110 inmates, to which fallen women are also committed by the courts. An old building located on Bolton road was converted into a home for consumptives and is known as the House of Rest for Consumptives.

The means of transit are the subway which has a station at Dyckman street distant 3,200 feet from the entrance of the lower Bolton road, and the Broadway surface road, 1,520 feet away. The distance along the lower Bolton road to the property of the Inwood Dock, Warehouse & Markets



Co., Inc., is about 2,500 feet. These transit facilities have been in existence since 1906, in which year the subway was extended to Dyckman street. No additional facilities for travel have been furnished to this neighborhood since 1906, nor have there been any improvements made on Inwood hill in the past thirty or forty years except the building of the institutions above mentioned. Since the subway was opened in 1906 about fifteen per cent of the available property in the neighborhood and within easy access to the subway station has been improved.

While the claimants separately own the damage parcels involved in this appeal and they appear by different attorneys, they united for the purpose of presenting a plan of improvement which involved the four properties owned by them and seven or eight other parcels owned by seven or eight different owners.

This plan of improvement was prepared by a landscape architect, Mr. Leavitt, and an engineer, Mr. Wheeler. It involved the construction, regulating, grading and paving of two streets, with sewer systems, which would run through and appropriate parts of the property of the other owners, who had not signified their assent to the scheme and yet were to be saddled with a goodly portion of the expense. On these streets were to be erected large and handsome apartment houses, which could be rented at twelve dollars per room per month, thus returning a handsome revenue to the owners.

This landscape artist and engineer must have received their inspiration from reading "The Gilded Age," for their idea savors very much of Colonel Sellers' plan to cut up a Mississippi plantation into corner lots and sell them at the prevailing prices for such lots on Broadway, New York, and thus realize millions. The fact that there would be no tenants for the apartments in this lonely inaccessible spot did not trouble the landscape architect and the claimants' experts any more than the lack of purchasers troubled the Colonel. The plan was altogether too speculative and fanciful to merit the slightest consideration, and the learned justice at Special Term treated it with the degree of respect it deserved by ignoring it.

In estimating the reasonable market value of the property at the time it is acquired in proceedings of this kind, the

owner is entitled to have considered the adaptability of the land to the purposes for which it could most profitably be used. But it is to be considered only so far as the public would have considered it if the land had been offered for sale. What the owner is entitled to is the value of the property taken, and that is what it is fairly believed a purchaser in fair market conditions would have given for it in fact; what a purchaser, who is not compelled to buy, would pay under ordinary circumstances to a seller who is not compelled to sell. (*People ex rel. Brown v. Purdy*, 186 App. Div. 54, 57; *affd.*, 226 N. Y. 635.) But he is not entitled to have his damages based upon a plan of improvement that is speculative and fanciful. (*Matter of City of New York [Blackwell's Island Bridge]*, 118 App. Div. 274; *Matter of Bronx Parkway Commission*, 191 *id.* 212; *People ex rel. Strong v. Hart*, 216 N. Y. 517; *New York v. Sage*, 239 U. S. 57.) The city objected to the reception of the evidence, and moved to strike it out and urges its exception to the rulings of the court as reversible error. How the reception of evidence that was held to present a speculative and fanciful plan and was disregarded by the justice who tried the case can be considered prejudicial is hard to comprehend. It must appear that it has influenced the decision, that the erroneous theory was adopted by the justice, and resulted in an award which is an injustice to one party or the other. (*Matter of City of New York [Croton River Dam]*, 129 App. Div. 707, 710; *Silver Creek & Dunkirk R. Co. v. Baker*, 18 N. Y. Supp. 331.) The mere fact that the court did not accept the testimony of the city's experts as to value does not show that he was influenced by the fanciful and speculative plan presented by the claimants. The court in these proceedings is governed by the same rules as were applied to commissioners in condemnation prior to the adoption of the amendment to the Constitution and the resulting legislation. (See Const. [1913] art. 1, § 7; Laws of 1915, chap. 606, adding to Greater N. Y. Charter [Laws of 1901, chap. 466], chap. 17, tit. 4, as *amd.*) The court views the property, and as was said in a recent case: "The commissioners, of course, are expected to consider the evidence. But their function is not merely to pass upon the credibility of witnesses, especially experts produced by the parties, or to decide which set of such expert witnesses reveals itself as

more correct in estimate, and then slavishly adhere to that set. The commissioners are to exercise their own judgment, and they may arrive at their conclusion in disregard of the figures of any or all experts. They are 'untrammelled by technical rules of evidence and unrestricted as to their sources of information. \* \* \* They shall be guided by their own judgment and experience, rather than by the opinions of witnesses.' " (*Matter of Bronx Parkway Commission*, 192 App. Div. 412, 418.)

The city owns a part of the property that is involved in this proceeding. The corporation counsel called experts who testified to the value, and as the city was interested both as petitioner and claimant, of course no evidence to the contrary was offered; and the learned justice made the award in accordance with that testimony. The city now complains that he did not disregard that testimony and make awards to it on the same basis that he did to others. The learned justice may very well have assumed that the city was asking only the usable value of the property to it, and that the testimony produced by it showed the true value at which its representatives appraised the property. It may be of course that it was willing to have a value lower than the true one placed on its property if it thereby could secure a lower valuation than the true one on the property of others and thus recoup the city for the loss sustained on its own property. We, however, cannot indulge in such an assumption. We find no error in the allowance to the city of the full amount claimed by it as its damage.

We do not find that the court proceeded on an erroneous theory or that the awards are excessive. The judgment will, therefore, be affirmed, without costs to any of the parties.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Decree affirmed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EMPIRE  
MORTGAGE COMPANY, Appellant, v. JACOB A. CANTOR and  
Others, Respondents.

First Department, July 1, 1921.

**Taxation — certiorari to review assessments on parcel of real estate in city of New York — assessments invalid — basis of valuation of tracts subdivided into plots in undeveloped section unwarranted — valuation placed on property by disinterested witnesses adopted.**

In a certiorari proceeding instituted to review assessments for the purpose of taxation on two tracts, constituting one parcel of real estate in the city of New York, an assessment of practically fifty per cent above the cost price will be set aside as excessive, where in making the assessment no consideration was given to the sales price of the property or to the fact that it had been on the market for years without an offer, and where it appeared that there had been no increase in the value of the tracts since 1910, and that the property was on a side hill, in an undeveloped section of the city, and for which assessment justification is sought in speculative valuations based upon fanciful development and in the sale of a plot differently situated.

The valuation placed on the parcels by witnesses of experience and without interest in the matter and whose individual estimates approximated each other should be adopted as the valuation for the assessment.

APPEAL by the relator, Empire Mortgage Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of October, 1920, confirming after a trial assessments for taxation upon real property and dismissing a writ of certiorari.

*Henry De Forest Baldwin* of counsel [*Franklin Grady* with him on the brief; *Lord, Day & Lord*, attorneys], for the appellant.

*William H. King* of counsel [*Charles E. Lalanne* with him on the brief; *John P. O'Brien, Corporation Counsel*, attorney], for the respondents.

PAGE, J.:

This is a certiorari proceeding instituted to review assessments for the purposes of taxation for the year 1918 on parcels of improved and unimproved real property situated in the borough of Manhattan consisting of fifteen separately

assessed lots lying in four blocks as shown on the tax maps, but all comprised within two tracts which have generally been referred to as the Billings property and the Hays property. The two tracts adjoin and constitute one parcel except as divided by streets. With the exception of a parcel west of Riverside Drive lying far below that thoroughfare, the property is bounded on the west by Riverside Drive and on the east by Broadway. The southern boundary is approximately 280 feet north of a line extended from One Hundred and Ninety-second street and the northerly line is from 208 to 250 feet north of Corbin place. The property lying between Riverside Drive and Broadway, with the exception of lot 646 in block 2180, comprises a steep rocky ledge on top of which is some level ground that has been utilized for buildings. On the Billings property there is the Mansion House or Tryon Tower, together with a swimming pool, a garage, a stable which was rented for \$6,500 per year, the lodge which rented for \$420 per year, and a stone building described as Libbey Castle which rented for \$3,000 per year. On the Hays property is the Abbey Inn, a frame building rented for \$2,500 per year and a cottage and greenhouses rented for \$650 per year, and a cottage and stable on the west side of Broadway rented at \$300 per year. These properties were bought by John D. Rockefeller, Jr., to be presented to the city for a park in January, 1917. He paid for the Billings property \$750,000 and for the Hays property \$500,000. The property was assessed for taxation, the Billings property at \$1,276,000, and the Hays property at \$573,520, a total of \$1,849,520. These properties had been on the market for a number of years with no offers for the Billings property and an offer of \$400,000 for the Hays property. An employee of Mr. Joseph P. Day testified that the Billings property had been placed in his hands for sale, that he had tried for more than a year to sell it, sending from 100 to 150 letters to men of wealth, trying to interest them, but had received no offers. He appraised the property for Mr. Billings as of October 1, 1917, at \$740,391 and he did not think the property had increased in value. All of the experts agreed that there had been no increase in the value of these properties since 1910. The city's experts testified that they gave no con-

sideration either to the sales price, or to the fact that the property had been on the market for sale for a number of years without an offer, because it was offered as a tract whereas it should have been offered in plots. They admitted that lots could not be sold, but stated that plots suitable for the erection of villas or high class apartments could have been. The lack of transportation facilities did not affect their judgment of the value of this property for the purpose of such a development, for the persons interested could run bus lines even if the traction companies would not extend their lines. That the property was largely on a side hill and that locations for houses would have to be blasted out leaving a precipitous cliff in the rear was rather an advantage because you could train morning glory vines over the rocks, thus giving the effect of living in a bower. We have had occasion to comment on these iridescent dreams as a substitute for present value in the case of *Matter of City of New York (Inwood Hill Park)* (197 App. Div. 431), decided herewith. The city in that case vigorously opposed the acceptance of such a basis for valuation and urged us to reverse the court at Special Term, although the justice had dismissed the whole plan as speculative and fanciful, for fear that his mind might unconsciously have been influenced by the valuations given. Yet in this proceeding we find the city attempting to bolster up an excessive valuation with exactly the same kind of evidence. It is even more absurd in this case than in the *Inwood Hill Park* case, for that was a proceeding in condemnation in which the owners were entitled to receive the highest usable value of their property which was being taken from them by eminent domain; while this is an assessment for the purpose of annual taxation. If the prophetic vision of the city's witness is justified by time, then the city can adjust its valuations for those years upon the conditions as they then exist. Furthermore, this property is less accessible to transportation facilities than was the *Inwood Hill Park* plot.

Justification is sought for these valuations in the sales of the Bennett plot to the south. But the Bennett property was very differently situated. It was within a few minutes' walk of the One Hundred and Ninety-first street station of the subway, and directly along the line of Broadway, with cross

streets running through it, and it was in a developed neighborhood. There is no basis for comparison of the Bennett property with this property. It might be remarked in passing that the sale of the Bennett property was conducted by Joseph P. Day as appears from the evidence in this case. It also appears that Mr. Billings had this property in Mr. Day's office for sale. If, therefore, this property could have been advantageously sold in separate lots, as was the Bennett property, we may reasonably infer such a course would have been followed.

The Court of Appeals has recently had occasion to consider the argument whether a tract of land should be valued as a whole or "upon the conjectured outcome of a proposed venture in subdividing the property and offering it for sale in lots. The true rule applicable to property situated like that of the relator was correctly stated by Mr. Justice CULLEN in *Matter of Daly v. Smith* (18 App. Div. 194, 197) where he said: 'It is doubtless true, and settled by authority, that the landowner is not limited in compensation to the use which he makes of his property, but is entitled to receive its greatest value for any purpose. But still it is the market value of the property that is the measure of the compensation. When, therefore, it is sought to show that a tract of land has a use for a particular purpose, it must also be shown that it is marketable for that purpose, or has an intrinsic value. \* \* \* Nearly any tract of land or any farm can be cut up into lots or villa sites. The question is not whether it can be so subdivided, but whether purchasers for the lots can be found, and also how speedily found. For if only small parts can be sold at intervals, and a number of years must elapse before the whole property can be disposed of, it is apparent that it would be unfair to take as a present value of the property a sum only to be realized after a long lapse of time.' The propriety of pursuing the course adopted by the assessors in the present case, therefore, depended upon the question whether the relator's property was presently marketable if subdivided according to their assumption." (*People ex rel. Strong v. Hart*, 216 N. Y. 513, 517.)

Contrasted with these speculative and fanciful valuations of the city's experts we have evidence of appraisals made for

seller and buyer at different times, made not for the purpose of testimony, but to advise as to a fair market price. We have a purchaser, who is not compelled to buy, and a seller who is not compelled to sell, agreeing on a price. We have the testimony of experts, whose business is not appraising property for the purpose of litigation but who are engaged as brokers in buying and selling real estate and are familiar with the trend of the values of real estate in this neighborhood. And all of these valuations approximate each other within a few thousand dollars. In our opinion this testimony shows the true market value of the property to-day and the valuation put upon each separately assessed lot by David Stewart should be adopted as the valuation for the assessment of the property for the purpose of taxation for the year 1918.

The order is, therefore, reversed, with ten dollars costs and disbursements to appellant, and the assessment fixed as herein indicated, with costs to the relator.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and assessment fixed as indicated in opinion, with costs to relator. Settle order on notice.

JOHN WANAMAKER, NEW YORK, Respondent, Appellant, v.  
THE CITY OF NEW YORK, Appellant, Impleaded with DOCK  
CONTRACTOR COMPANY, Respondent.

First Department, July 1, 1921.

**Municipal corporations — negligence — damages caused by breaking of sewer in city of New York constructed in compliance with plans of Public Service Commission — contractor not liable where insufficiency of sewer directly referable to faulty plans of engineers of Public Service Commission or improper maintenance by city — city not liable for negligence of Public Service Commission or of independent contractors under it — city having accepted and maintained sewer with knowledge of defects in construction is liable for resulting damage.**

In an action for damages brought about by the breaking of a "U" shaped portion of a sewer adjoining plaintiff's store in the city of New York it appeared that the sewer was constructed by the defendant contractor



in exact compliance with the plans of the Public Service Commission and in accordance with the terms of the contract; that the sewer was much smaller than the one it replaced and was constructed of brick without reinforcement so that it could not resist a great deal of pressure; that the "U" ran into a space where about seventy-five men were employed by the plaintiff and in which were the boilers for the heating plant and other machinery, rendering a break dangerous to human life; that it was reasonable to apprehend that a heavy rainfall or clogging from other causes would subject the sewer to unusual pressure and cause it to break at this point, and that the chief engineer in charge of sewers of the city had knowledge of the reduced capacity of the new sewer.

*Held*, that any insufficiency of the sewer was directly referable to the faulty plans of the engineers of the Public Service Commission or its improper maintenance by the city for which the contractor cannot be held liable; That the city is not liable for the negligence of the Public Service Commission or of independent contractors under it in planning and constructing the work;

That the city is liable for the resulting damage to the plaintiff, since it accepted and maintained the sewer in its dangerous condition after having knowledge of the defects in construction.

APPEAL by the plaintiff, John Wanamaker, New York, from so much of a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 2d day of February, 1920, as dismisses the complaint as against the defendant Dock Contractor Company.

Appeal by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in said clerk's office on the same day on the verdict of a jury.

*Richard Ely* of counsel [*Hedges, Ely & Frankel*, attorneys], for the respondent, appellant.

*Joseph F. Caponigri* of counsel [*Joseph Beihlf* with him on the brief; *John P. O'Brien*, Corporation Counsel, attorney], for the appellant, City of New York.

*John P. Maloney* of counsel [*Stanton & Maloney*, attorneys], for the respondent Dock Contractor Company.

PAGE, J.:

The Dock Contractor Company had a contract for the construction of that portion of the new Broadway subway which is in front of the department store of the plaintiff. In

connection therewith it relocated and rebuilt the sewer which, prior to the construction of the subway, was located in the center of Broadway. In accordance with the plans and specifications prepared by the engineers of the Public Service Commission, which were submitted to the chief engineer in charge of sewers of the city of New York, this sewer was relocated to run behind the wall of the subway close to the building line on the east side of Broadway. At the new building of the plaintiff it curved in a "U" shape into the open vault space adjoining and practically a part of the plaintiff's sub-basement. It is not disputed that the sewer was constructed by the Dock Contractor Company in exact compliance with the plans and specifications of the Public Service Commission, and in accordance with the terms of its contract. It is not claimed that the work was done by it in a negligent manner. Any insufficiency of the sewer as constructed was directly referable to the faulty plans of the engineers or its improper maintenance by the city, for which the contractor cannot be held liable. (*Gibney v. Rodgers & Hagerty, Inc.*, 161 App. Div. 286.) The court, therefore, properly directed judgment in favor of the defendant, the Dock Contractor Company.

About six months after the sewer was built a heavy rainfall began at about two o'clock in the afternoon, and at two-thirty-five P. M. the "U" shaped portion of the sewer gave way and flooded a portion of the sub-basement, and inflicted damage, which the jury assessed at \$12,556.36, and which is not claimed to be excessive.

The city is not liable for the negligence of the Public Service Commission, or of independent contractors under it, in planning or constructing the work. (*O'Brien v. City of New York*, 182 App. Div. 810, 814; *Schmidt v. City of New York*, 179 id. 667; *affd.*, 228 N. Y. 572; *Smyth v. City of New York*, 203 id. 106; *Carpenter v. City of New York*, 115 App. Div. 552, 557.) This is well settled and was stated a number of times by the justice in the course of the trial and repeatedly impressed upon the jury in the charge. The court said in the charge: "But I want you to get this clearly in mind, and I think you have it clearly in mind, from the trend of the trial and the remarks of counsel and the court during the

trial, that whatever negligence there may have been on the part of the Public Service Commission the city is not responsible for. They are an independent body created by the Legislature, and the city is not responsible for the negligence of the Public Service Commission. The city is responsible only for its own negligence."

The theory of the liability of the city was plainly put before the jury in charging a request of plaintiff's counsel: "Mr. Ely: I don't think this is very different from what your Honor has charged. I would ask your Honor to charge that it was the duty of the city to exercise reasonable care to maintain the sewer structures which it used in a proper and safe condition, and that if at, or after the date when the Public Service Commission surrendered control of the sewer, the city knew, or had reasonable cause to believe that the structure which broke was not constructed of materials to resist an internal pressure which might reasonably be expected to be imposed upon it, and if the jury believe that such inadequate structure was a contributing cause of the accident, and that the city did not act with reasonable diligence in correcting the condition complained of, after notice of its existence, the city is liable. The Court: In such case you may find the city guilty of negligence. You may. The question of negligence is for you, if all the facts and circumstances warrant it."

The negligence of the Commission, except as brought home to the city by its acceptance and continued use of a dangerous and defective structure, was wholly irrelevant to the plaintiff's case.

The city's liability arises from these considerations:

*First.* The relocated sewer was much smaller than the sewer which it replaced.

*Second.* The sewer was constructed of brick without reinforcement which concededly, when placed in an open space such as this vault, would not resist much pressure.

*Third.* The "U" of the sewer ran into a space that was practically a part of the plaintiff's building, where about seventy-five men were employed and in which were the boilers for the heating plant and elevator machinery of the two large buildings operated as a department store. Hence a break in

the sewer at this place was dangerous to the life of a large number of people.

*Fourth.* As constructed it was reasonable to apprehend that a heavy rainfall or a clogging from other causes would subject the sewer to unusual pressure and cause it to break at this point.

It was shown that in advance of the letting of the contract the plans were submitted to the chief engineer in charge of sewers of the city for his suggestions and approval; that in 1911 the successor of the first engineer called attention to the reduced capacity of the new sewer and suggested that it be made larger; and that the Public Service Commission suggested that he take the matter up with the contractor, which he signified his intention of doing. The city, through those having charge of its sewers, had knowledge of the defects in construction, and yet it accepted the sewer and maintained it in its dangerous condition. Hence the city was liable for resulting damage. (*McCarthy v. City of Syracuse*, 46 N. Y. 194; *Hines v. City of Lockport*, 50 id. 236; *Nims v. Mayor, etc., of City of Troy*, 59 id. 500; *Vogel v. Mayor, etc.*, 92 id. 10; *Schumacher v. City of New York*, 166 id. 103; *Rumetsch v. Wanamaker, New York, Inc.*, 216 id. 379.)

On the plaintiff's appeal the judgment is affirmed, with costs to the respondent Dock Contractor Company. On the city's appeal, the judgment is affirmed, with costs to the plaintiff.

DOWLING, SMITH and GREENBAUM, JJ., concur; CLARKE, P. J., dissents.

On plaintiff's appeal judgment affirmed, with costs to respondent Dock Contractor Company. On appeal of defendant The City of New York, judgment affirmed, with costs to plaintiff.

WILLIAM A. McDONNELL, Respondent, v. BERENT C. GERKEN and Others, Copartners Doing Business under the Firm Name of ADLER & ECKSTEIN, Appellants.

First Department, July 1, 1921.

**Nuisance — action to recover for injuries suffered from faulty operation of freight elevator upon theory that it was of dangerous construction and unlawfully maintained — defendant not liable where structure was lawfully constructed and not dangerous for purpose for which maintained — negligence not shown.**

The complaint should have been dismissed in an action for personal injuries brought on the theory of nuisance, where it appeared that the plaintiff was injured while aboard an elevator constructed and maintained for use as a freight elevator and not for the transportation of persons and that the structure was wholly within the defendant's premises, lawfully constructed and not dangerous when used for the purpose for which it was constructed and maintained.

The danger of injury to others in the use of a structure must be apparent and reasonably to be apprehended in order to constitute a nuisance.

If injury occurred to plaintiff by reason of the careless operation of the elevator, his redress would be in an action for negligence and not nuisance. But the plaintiff failed to show negligence by any one for whose act any of the defendants would have been responsible.

APPEAL by the defendants, Berent C. Gerken and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 16th day of January, 1920, on the verdict of a jury for \$15,000, and also from an order entered in said clerk's office on the 30th day of January, 1920, denying defendants' motion for a new trial made upon the minutes.

*Walter G. Evans* of counsel [*G. Everett Hunt*, attorney], for the appellant Gerken.

*James J. Mahoney*, attorney for the appellants Adler & Eckstein.

*Vincent L. Leibell* of counsel [*Valentine Taylor* with him on the brief; *Phillips, Mahoney & Leibell*, attorneys], for the respondent.

PAGE, J.:

The case was submitted to the jury on the theory that the freight elevator in the premises was of an obviously dangerous construction, wrongfully and unlawfully maintained.

The plaintiff was employed by the subtenant of the two upper floors of a building owned and constructed by the defendant Gerken and leased to the defendants Adler and Eckstein who occupied the first and second floors. An elevator shaft of brick extended from the ground floor to the roof on the west side of the front of the building. On the opposite side was a stairway leading to all the floors of the building. In the wall of the street side of the shaft there was a window on each floor; the casement and sashes of these windows were set into the wall so that the window panes were about eight inches from the surface of the shaft wall. In this shaft was a freight elevator, the floor of which was seven feet, five inches by five feet, eight inches. The sides of the elevator were inclosed, but the front and rear were open, to allow entrance from the street and floors of the building. It was started and stopped by a cable on which was a safety clutch; when the clutch was closed it prevented the starting of the elevator. There was no one employed to operate the car.

On the day in question the plaintiff brought furs that he had collected from the customers of his employer, and with the help of his assistant and his employer's shipping clerk loaded them on the elevator. The helper ran the elevator to the third floor, and the plaintiff rode up with the load. After his receipt book was signed, he returned to the elevator and stood looking out of the window in the elevator shaft while the furs were being transferred from the elevator. The elevator suddenly started up and the plaintiff was caught between the top of the window opening and the floor of the elevator and seriously injured.

It is not disputed that the defendant Gerken employed a competent architect to make the plans and superintend the construction of the building, including the shaft; that those plans were approved by the building and fire departments of the city of New York; that after the shaft and elevator were constructed they were inspected and tested by inspectors of those departments and found to comply with the law and

the requirements of the building department; and that they were of a type in common use in the city of New York.

The shaft and elevator were constructed and maintained for use as a freight elevator and not for the transportation of persons; in fact, a notice was conspicuously posted in the elevator: "For freight only. Persons riding on this elevator do so at their own risk." In order to constitute it a nuisance the combination of the elevator and shaft must be inherently dangerous when used for the purpose for which it was constructed and maintained. The danger of injury to others in its use must be apparent and reasonably to be apprehended.

There was no danger of injury to any person in the combination of the recess in the shaft and the elevator. The cable to operate the elevator was on the side opposite the window. Therefore, no person who would have a right, or could reasonably be expected to ride on the elevator, would have occasion to be on the side toward the window. The structure was wholly within the defendants' premises, lawfully constructed and not dangerous when used for the purpose for which it was constructed and maintained. If injury occurred to the plaintiff by reason of the careless operation of the elevator, his redress would be in an action for negligence and not nuisance. (*Glover v. Holbrook, Cabot & Rollins Corp.*, 189 App. Div. 328.) The plaintiff failed to show negligence of any person for whose act any of the defendants would have been liable. The complaint should have been dismissed.

The judgment and order should be reversed, with costs, and complaint dismissed, with costs.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

In the Matter of the Judicial Settlement of the Account of  
MARY ROWE, as Administratrix, etc., of WILLIAM ROWE,  
Deceased, by CONRAD HILBERT, as Administrator, etc., of  
MARY ROWE, Deceased.

MARY L. LOTT and Others, Appellants; CONRAD HILBERT and  
Others, Respondents.

First Department, July 1, 1921.

**Executors and administrators — decree of Surrogate's Court adjudging absentee died prior to issuance of letters not res judicata as to date of death and binding on surrogate of another county — presumption of death — person presumed dead seven years after being last heard from for purpose of establishing rights in estate — evidence — insufficiency of proof to raise presumption of death — deposit of share of estate to credit of proceeding.**

A decree of a Surrogate's Court in proceedings to have an administrator of the estate of an absentee appointed, is in no event an adjudication with respect to the time of the death of the absentee and binding on the surrogate of another county, in a proceeding in which the exact date is material, since the *date* was not necessary to be established with exactness and all the surrogate had to determine was that the absentee was presumed to be dead prior to the issuance of letters and accordingly fixed the date as the date of the decree authorizing letters to issue.

It was incumbent on the administrator of the absentee, in order to substantiate his claim to a part of the brother's estate, to prove as a fact that the absentee survived his brother.

The surrogate was well within the rules of presumption of death when he applied the period of seven years to extend from certain dates which the evidence showed were the last time any mention was made of any of the absentee's relatives having heard from him and where the letters undoubtedly referred to information received some years before their dates.

The evidence did not show a diligent and systematic search to ascertain whether a nephew of the deceased, who left his home many years before, was alive, and it was correctly held that enough evidence was not introduced to raise a presumption of his death, and it was proper to direct that his share in his uncle's estate be paid to the chamberlain of the city of New York to the credit of the proceeding.

APPEAL by Mary L. Lott and others from a decree of the Surrogate's Court of the county of Bronx dated the 10th day

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of December, 1919, distributing estate *per capita* instead of *per stirpes*, recognizing decedent's nephew Michael Lynch surviving him, and from two transfer tax orders fixing five per cent tax instead of one per cent on Thomas Rowe's share.

*Philip S. Dean* of counsel [*George W. Ellis*, attorney], for the appellants, children and administrator of Thomas Rowe.

*John Davis*, special guardian of the respondents Catherine M. Lynch and others.

*Sidney Rossman*, attorney [*Julius M. Lowenstein* with him on the brief], for the respondents Bridget Langrick and others.

*Edward R. Koch*, special guardian for unknown persons.

*Henry W. Unger* of counsel [*Unger & Unger*, attorneys], for accountant and respondent Conrad Hilbert.

PAGE, J.:

The appeal in this proceeding from the decree directing the distribution of the estate of William Rowe, deceased, involves the review of the orders fixing the transfer tax on said estate.

Three questions are presented for determination: 1. Did Thomas Rowe die before or after his brother William Rowe? 2. Is Michael Lynch, a nephew of William Rowe, alive or presumed to be dead? 3. Is the decree of the Surrogate's Court, New York county, appointing an administrator of the estate of Thomas Rowe and fixing the date of his death as February 2, 1917, *res adjudicata* and binding on the surrogate of Bronx county?

William Rowe was born December 24, 1842, and died intestate in Bronx county July 22, 1915. His elder sister, Mary Lynch, a resident of Michigan, died before him leaving descendants, and his younger sister Margaret Sheridan died without issue before the decedent. His younger brother, Thomas Rowe, was born in 1844. In 1874 while employed as a laborer, first class, in the department of yards and docks in the Brooklyn Navy Yard, he abandoned his wife and four children, from six weeks to six years of age, without disclosed cause, and without making any provision for their support,

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and has never since then communicated with them or any of them. William Rowe, the decedent, took care of the abandoned family, giving money for their support and interesting himself in their welfare like a father. His intimacy with them continued until the day of his death. After the death of William Rowe, the children of Thomas Rowe instituted and conducted a thorough inquiry and search for him, and not only failed to find him, but failed to locate him anywhere, at any time, since his abandonment of his family in 1874. Thereupon, in 1916, his children began a proceeding before the New York county surrogate to establish his death after that of his brother William Rowe and for the appointment of an administrator of his estate. In this proceeding it was not necessary to cite any one as all the children joined in the petition. (Code Civ. Proc. §. 2590.) The proceeding was referred to a referee before whom testimony was taken, and he made his report finding the petitioners entitled to a decree adjudging that Thomas Rowe, brother of William Rowe, is dead as of the date of the decree. Surrogate FOWLER approved and confirmed the findings and conclusions of the referee, and entered a decree thereon fixing the date of the death of Thomas Rowe as February 2, 1917; and in accordance with the prayer of the petition directed that letters of administration issue to the Lawyers Title and Trust Company.

Letters of administration on the estate of William Rowe were issued to his widow, Mary Rowe, by the surrogate of Bronx county on August 10, 1916. She died on October 25, 1916; letters of administration on her estate were issued to her brother on November 2, 1916; and a proceeding was thereafter commenced for the judicial settlement of her account as administratrix of the estate of William Rowe. A proceeding was thereupon had before a transfer tax appraiser, and the attorney for the children and the administrator of the estate of Thomas Rowe appeared and offered in evidence a complete record of the proceeding in the New York county Surrogate's Court and the decree fixing the date of the death of Thomas Rowe as February 2, 1917; and he contended that this decree established that Thomas Rowe survived William Rowe, and that his share of the estate should be paid over to his administrator, and was subject to a tax of one per cent

and entitled to an exemption of \$5,000. The appraiser assessed the tax on the theory that Thomas Rowe predeceased William. An appeal was taken to the surrogate, who affirmed the findings of the appraiser.

It is asserted that the decree of the Surrogate's Court of New York county fixing the date of the death of Thomas Rowe was *res adjudicata* and binding on the parties to this proceeding. This contention is supported by the argument that the evidence in the two proceedings was identical; that the jurisdiction of the Surrogate's Court of New York county depended upon the fact of the death of Thomas Rowe; and, therefore, the adjudication cannot be assailed collaterally; and the head note to *O'Connor v. Huggins* (113 N. Y. 511) is quoted: "Although Surrogates' Courts are courts of special and limited jurisdiction, where jurisdiction to act exists their orders or decrees are conclusive until they are revoked or reversed on appeal. \* \* \* That conclusiveness, in the absence of fraud or collusion, attaches in a case where a jurisdictional fact is in question and it appears there was proof with respect to its existence, upon which the surrogate decided."

In that case an attack was made upon the jurisdiction of the court, to grant letters of administration, where the administrator had after proper application been permitted to sell real estate of the decedent to pay debts. The purchaser refused to take title and an action was brought to compel a specific performance of his agreement. The defense was that the Surrogate's Court did not have jurisdiction to grant letters because the decedent had no personal property within the county of the surrogate. In the instant case the jurisdiction of the surrogate to grant letters is not involved; the *date* of the death of Thomas Rowe was not necessary to be established, and all that the surrogate had to determine was that he was presumed to be dead prior to the issuance of letters; and the surrogate fixed the date as the date of the decree authorizing letters to issue. Letters of administration are not *prima facie* evidence of the death of the intestate; they are conclusive evidence of the authority of the person to whom granted and are sufficient to establish the representative character of the party who assumes to sue by virtue thereof. (*Carroll v. Carroll*, 60 N. Y. 121, 123.) The decree

of the Surrogate's Court merely decided that under the laws of the State Thomas Rowe was presumed to be dead. (*Marks v. Emigrant Industrial Savings Bank*, 122 App. Div. 661, 663.) In no event was it an adjudication with respect to the time of his death, and it was incumbent on the administrator to prove as a fact that Thomas survived William, in order to substantiate his claim to a part of William's estate. (*Williams v. Post*, 158 App. Div. 818, 820; *Eckersley v. Curran*, Id. 440, 442.) In the case under consideration it was necessary to determine the time when the presumption of death did arise. Although the evidence was the same before the Bronx county surrogate as before the New York county surrogate, the exact question to be determined was different. All the New York county surrogate was required to decide was whether Thomas was presumed to have died some time before letters were to be issued. The question to be determined by the Bronx county surrogate was whether Thomas died before July 22, 1915. The evidence was that the last time any mention was made of any of his relatives having heard from Thomas was in December, 1894, and January, 1895; and that the letters of those dates undoubtedly referred to information received some years before their dates. The surrogate was well within the rules of presumption of death when he applied the period of seven years to extend from those dates. The case of *Matter of Wagener* (143 App. Div. 286), in which this court laid down the rules as to the presumption of death arising from long-continued and unexplained absence, has subsequently been referred to as authoritative. (*Cerf v. Diener*, 148 App. Div. 150; *Matter of Benjamin*, 155 id. 233, 234.) The appellant suggests that the authority of these cases is impaired by the fact that *Cerf v. Diener* was reversed by the Court of Appeals (210 N. Y. 156). That case was a submitted controversy pursuant to section 1279 of the Code of Civil Procedure and the Court of Appeals held that from the evidentiary facts submitted different conclusions might be drawn, and hence a case was not presented for the determination of the Appellate Division within the provisions relating to submitted controversies; and the Court of Appeals, therefore, reversed and dismissed the proceeding without prejudice to the bringing of an action.

In the instant case we find that the decision of the surrogate is supported by the evidence.

The appraiser also held that there was a presumption that Michael Lynch, a nephew of the deceased, died before William Rowe. The surrogate reversed this finding and held that the evidence was insufficient to raise the presumption of his death. The only evidence submitted on this question was an affidavit of Margaret M. Lynch, a sister of Michael, stating that he left his home in or about the year 1887; that some years afterward several letters were received from him from somewhere in British Columbia and thereafter a letter from Mazatlan, State of Sinaloa, Mexico, stating that he intended to go into the mountains; and that he had never been heard from since; that at the time of the last-mentioned letter the bubonic plague was prevalent in that portion of Mexico, and that the Yaqui Indians were in revolt and were murdering citizens of various nationalities, including Americans; that she had caused inquiries to be made through officers of the United States of America, both in British Columbia and in Mazatlan, but had been unable to obtain any information as to his whereabouts.

The letters referred to as having been received from Michael Lynch were not produced nor was the date of their receipt given. Nor was it shown what inquiries were made of "officers of the United States" or who these officers were, nor were the replies of these officers produced. This failed to show diligent and systematic search to ascertain whether he was alive, and as the surrogate correctly held, was entirely insufficient to raise a presumption of death. (*Dunn v. Travis*, 56 App. Div. 317; *Matter of Wagener*, *supra*.) It is significant that the learned counsel presented most circumstantial and detailed evidence as to the facts which tended to establish the death of Thomas Rowe, but contented himself with this insufficient statement as to Michael. It is safe to assume that nothing further could be presented than was. The surrogate has directed that the share of Michael Lynch be deposited with the chamberlain of the city of New York to the credit of the proceeding. At some future time an application can be made for the payment over of this fund. At that time further evidence can be produced. The rights

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of no person are, therefore, adversely affected by this disposition of the matter at this time.

The decree and orders are affirmed, with costs to all parties appearing and filing briefs on this appeal payable out of the estate.

CLARKE, P. J., LAUGHLIN, SMITH and GREENBAUM, JJ.,  
concur.

Decree and orders affirmed, with costs to all parties appearing and filing briefs on this appeal payable out of the estate.

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ARCHIBALD CHARLES HEAPHY, Respondent, Appellant, v.  
OTTO M. EIDLITZ and ROBERT J. EIDLITZ, Appellants,  
Respondents.

First Department, July 1, 1921.

**Pleadings — action on contract of employment — allegations in complaint, irrelevant to cause of action alleged, properly stricken out — distinct alternative causes of action should be separately stated and numbered — complaint to contain plain and concise statement of facts.**

In an action on a contract of employment, allegations relating to a prior contract of the same nature are irrelevant and immaterial to the cause of action sought to be alleged and were properly stricken from the complaint.

Two distinct alternative causes of action, inconsistent with each other, should be separately stated and numbered. Accordingly, where it is alleged in a complaint, in an action for commissions claimed to be due the plaintiff on net profits, that the defendant refused to determine the amount of net profits on demand, and it is also alleged that if the commissions paid to plaintiff represent a determination of the net profits then such determination was erroneous and unfair and included erroneous charges against the earnings and excluded earnings, two causes of action are pleaded which should be separately stated and numbered.

Section 481, subdivision 2, of the Code of Civil Procedure requires a complaint to contain a plain and concise statement of the facts constituting each cause of action without unnecessary repetition, so as to definitely inform the defendant, that he may intelligently prepare for trial and escape surprise.

APPEAL by the plaintiff, Archibald Charles Heaphy, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 5th day of August, 1920, as strikes out certain paragraphs of the amended complaint.

Appeal by the defendants, Otto M. Eidlitz and another, from so much of said order as denies in part defendants' motion to strike out certain paragraphs of the amended complaint and to compel the plaintiff to make said complaint definite and certain and separately state and number the causes of action, and to elect one of three inconsistent forms of alleging the first four causes of action in said amended complaint.

*Charles S. Noyes*, attorney for the plaintiff.

*Cornelius J. Sullivan, Jr.*, of counsel [*Eidlitz & Hulse*, attorneys], for the defendants.

PAGE, J.:

The court struck out the 4th, 5th, 6th, 7th and 8th paragraphs of the complaint as irrelevant and immaterial. They relate to a contract of employment which preceded the one involved in this action. The plaintiff appeals from this portion of the order. These allegations can have no possible relevancy to the cause of action sought to be alleged. The plaintiff says that this is an action on an account, but it is not. The order in so far as appealed from by plaintiff should be affirmed, with costs.

In disposing of a demurrer to a former complaint, the court pointed out that a determination of the net profits of the business upon which plaintiff's right to his commission is based was a prerequisite to his cause of action, and that the complaint must allege either that such condition has been complied with or that it has been waived by refusal on the part of the defendant to make such determination after demand by the plaintiff. In speaking of the provision of the contract that the determination of the net profits was to be made by the employer and "their determination to be final and conclusive," the court said that such a provision was not contrary to public policy, and that "The courts,

of course, would still have a right to set aside and disregard such determination, if made in bad faith." The plaintiff acting on this suggestion has presented in the amended complaint now before us by alternative pleading all of these suggested causes of action.

The complaint separately states four causes of action based upon the right to recover unpaid profits for different periods of employment. In each cause of action it is stated that the plaintiff had requested the defendants to make a determination and apportionment of the net profits and that the defendants refused, and have failed to make such determination and apportionment, and have waived the right to make such determination. If these facts are proved the court will ascertain the net profits of the business and make such apportionment as the contract requires.

The plaintiff also alleges that if such determination has been made, and if the amounts paid to him are claimed to be or were intended to be a determination of the amount due to him as his share of said net profits, they were not stated to him to be so intended; if so intended, the amounts represented by such payments were unfair, erroneous and unjust, and were not in accordance with the facts, and included erroneous charges against the earnings, and omitted earnings and receipts which should properly have been made the basis of such determination. To establish this cause of action the plaintiff will have to prove that items of charge were included, and that items of credit were omitted from the calculation and determination, either by mistake or intentionally in bad faith. It is obvious that there are two distinct alternative causes of action, which are inconsistent with each other.

As there are two causes of action set forth they should be separately stated and numbered, that the defendants may plead or move as they may be advised with regard to each. The court at Special Term held that the defendants could easily deny both. But the defendants may have defenses to one that they have not to the other, or may have other relief as to one which would not be applicable to the other. In the present form of the complaint, the defendants cannot avail themselves of these different pleadings or motions. The



Code of Civil Procedure requires the complaint to contain "a plain and concise statement of the facts constituting each cause of action without unnecessary repetition." (§ 481, subd. 2.) The purpose of this is that the defendant may be definitely informed of the facts constituting the cause of action, not alone that he may plead, but that he may prepare intelligently for trial and not be subjected to surprise by a claim of some unforeseen construction put upon obscure allegations of pleading at the trial. (*Glover v. Holbrook, Cabot & Rollins Corp.*, 189 App. Div. 328, 330; *Stabilimento Metalurgico Ligure v. Joseph*, Id. 173, 176 *et seq.*)

If the plaintiff desires to state only one cause of action he should elect which he desires to state, whether it be that the defendants refused after demand to make a determination and apportionment, or whether the determination and apportionment that they made was erroneous and fraudulent; and he should omit the allegations as to the other. If he desires to set up both causes of action then the facts constituting each should be separately stated and numbered. (See Code Civ. Proc. § 483.)

As it will be necessary for the plaintiff to serve an amended complaint he should make his allegations of payments more definite and certain. In the 24th paragraph of the complaint there are more than 500 items of payments stated with dates and amounts only. All but 34 of them are clearly payments on account of salary, about which there is no controversy, and have no proper place in the complaint. These merely serve to confuse the issues tendered.

The order will, therefore, be modified in accordance with this opinion and as modified affirmed, with ten dollars costs and disbursements to the appellant.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ., concur.

Order modified as directed in opinion and as so modified affirmed, with ten dollars costs and disbursements to appellant. Settle order on notice.

RICHARD KENNEDY, Appellant, v. THE CUNARD STEAMSHIP  
COMPANY, LIMITED, Respondent.

First Department, July 1, 1921.

**Ships and shipping — action to recover for injury to longshoreman as result of fall through hatchway aboard ship while employed as stevedore — master liable for failure to take reasonable precautions — foreman not fellow-servant — contributory negligence question for jury — no assumption of risk by plaintiff — Workmen's Compensation Law inapplicable, remedy being at common law — maritime law as to contributory negligence, fellow-servant doctrine and measure of damages applicable.**

In an action by a longshoreman, employed in stowing a cargo upon a vessel in navigable waters, to recover damages for injuries suffered by reason of a fall through an open hatchway, it appeared that in obedience to the foreman's orders, the plaintiff left the lower hold, where he had been employed all day, and came through the open hatchway to the orlop deck above where he had been directed to leave his coat; that the other men in the gang passed to the deck above just ahead of the plaintiff and proceeded to close down the hatches as they had been directed by the foreman; that as plaintiff turned toward a bulkhead door, the hatchway was suddenly closed without warning, leaving him to grope in the darkness for another exit; that after shouting to the men above and receiving no answer he proceeded to the bulkhead door cautiously, mindful of the open hatchway, and while carefully feeling his way in the darkness he suddenly fell and suffered injuries.

*Held*, on all the evidence, that the plaintiff made a *prima facie* case and the master was liable.

A duty devolved upon the master to take reasonable precautions to see that all the men had come up and not to close the hatches until all had had a reasonable opportunity to reach the upper deck. The master could perform that duty through another; but it was the master's duty that the other was performing and for a failure to discharge it the master was liable.

Whether the plaintiff was chargeable with contributory negligence was clearly a question of fact for the jury.

The risks which a servant assumes are either such as are incident to his employment, after the master has discharged his duty of reasonable care to prevent them, or such as are quite as open and obvious to the servant as to the master.

The plaintiff was not employed to work in the ship in the darkness, and it cannot be said he assumed the risk of falling into the hatch, when all light had been cut off by the master's negligent act.

*It seems*, that the plaintiff is not entitled to compensation under the Workmen's Compensation Law, but his remedy is at common law in the courts of this State under the rules of those courts. But the rules relating to contributory negligence, acts of fellow-servants and the measure of recovery must be determined by the maritime law.

APPEAL by the plaintiff, Richard Kennedy, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 21st day of May, 1920, upon the dismissal of the complaint by direction of the court at the close of the case.

*Robert Stewart*, for the appellant.

*Thaddeus G. Cowell* of counsel [*Lord, Day & Lord*, attorneys], for the respondent.

PAGE, J.:

Plaintiff was a longshoreman, and on September 23, 1916, was working for the defendant in loading the cargo on board the steamship *Andania*, then lying in the North river. He was working in the lower hold, below the orlop deck, at No. 3 hatch. This hatch and those directly above it on the upper decks were all of the same size, and formed the opening into compartment No. 3 of the ship. This compartment was divided from compartment No. 4 by a water-tight bulkhead extending clear across the ship on the orlop deck, and just aft of the hatch, leaving a space of only two or three feet between the bulkhead and the hatch. This bulkhead had in it a door opening from No. 4 to No. 3 compartment on the right-hand side of the hatch looking forward. The hatch was flush with the deck and had no coaming or guard around it. To go from his work in the lower hold to the dock it was necessary for the plaintiff to pass forward in the lower hold, across the hatch opening, to a ladder which extended up from the lower hold to the orlop deck through a small manhole, and on reaching the orlop deck to pass this open hatch to the bulkhead door, and enter compartment No. 4, and from there pass up the gangways until the upper deck was reached, and thence to the dock.

Plaintiff had worked all day in this lower hold, all the hatches being open clear to the upper deck, and the men

working by the daylight coming through these hatches. At five o'clock the foreman called out for the men below on the various decks to come up and put on their hatches. When plaintiff and his fellow-workmen went to work, they were told to leave their garments on the orlop deck. Plaintiff left his coat on the left side of the ship a little forward of the hatch on that deck. He was the last man of the gang to quit work on that day. The other men passed up to the decks above, and the first man up began to put the hatch covers on the hatch of the upper deck, this being the only one on which the covers were placed. These covers were in sections. At the time the plaintiff went up the ladder to the orlop deck these hatch covers were partly on, but there was sufficient light for him to see his coat. He walked over to the left-hand side and picked up his coat. As he turned to go to the bulkhead door, the hatch was suddenly closed, shutting out all light from the deck the plaintiff was on. Nothing was done to ascertain whether the men were all out, or any warning given before this was done. Plaintiff shouted to the men above. Getting no answer and realizing that the men were leaving the ship for the night, he then endeavored to make his way to the bulkhead door. He knew that he would have to pass the open hatch, so he proceeded cautiously, shuffling one foot ahead of the other carefully feeling his way in the darkness, trying to prevent himself from stepping into the open hatch. He suddenly fell into it and received injuries for which the action was brought.

At the close of the plaintiff's case the defendant's counsel moved to dismiss on the ground that the plaintiff had failed to prove facts sufficient to constitute a cause of action, also on the ground that the evidence proved contributory negligence, and that the plaintiff assumed the risk and that if there was any negligence it was the negligence of a fellow-servant for which the master was not responsible. The court granted the motion. In this he erred.

The danger of injury to a man, left in utter darkness in the ship with its open hatchway, was obvious. It was a duty that the master owed to the employees, to take reasonable precautions to see that all the men had come up from the hold and not to close down the hatches until all the men had

a reasonable opportunity to reach the upper deck. This was a duty that the master could discharge through another; but it was the master's duty that the other was performing, and for a failure to discharge it the master was liable. (*Corcoran v. Holbrook*, 59 N. Y. 517; *McGovern v. Central Vermont R. R. Co.*, 123 id. 280, 288; *Eastland v. Clarke*, 165 id. 420, 429.) The foreman in this case directed the work in the three aft hatches; the men took their orders from him and applied to him for tackle and other appliances used in their work; it was he who gave the orders to close the hatches. He was not a fellow-servant but was the *alter ego* of the defendant. The plaintiff made a *prima facie* case.

Whether the plaintiff, placed in the situation that he was by the closing of the hatch, and failing to get any response to his outcries, was chargeable with contributory negligence in going forward in the manner he did was clearly a question of fact for the jury. The plaintiff did not assume the risk. "It is now the settled law of this State that the risks which a servant assumes are either such as are incident to his employment, after the master has discharged his duty of reasonable care to prevent them, or such as are quite as open and obvious to the servant as the master." (*Eastland v. Clarke*, *supra*, 427.) The plaintiff was not employed to work in the ship in the darkness. The risk of falling into the open hatch in the daytime, when engaged in the work, he assumed. But the risk of falling into the hatch, when all light had been cut off by the master's negligent act, he did not assume. It follows that the judgment will have to be reversed and a new trial granted.

Involved in this case are questions of great importance which have not been determined by our Court of Appeals and are presented for the first time to this court on this appeal. They were suggested in the opening of counsel at the trial, but as the case was tried on the theory of common-law liability and so disposed of by the trial justice, we have not considered these questions in disposing of the case before us. As, however, we have ordered a new trial, and these questions have been presented by the counsel for the plaintiff, we feel it incumbent on us to give them careful consideration in advance of that trial, for the assistance of the trial court.

The plaintiff was a longshoreman employed in stowing a cargo upon a vessel engaged in foreign commerce, and sustained injuries upon the vessel when it was tied to a dock in the harbor of New York city. The Workmen's Compensation Law (§ 2, group 10, as amd. by Laws of 1916, chap. 622; since amd. by Laws of 1917, chap. 705, and re-enacted by Laws of 1918, chap. 249) classified longshore work, including the loading or unloading of cargoes or parts of cargoes, as among the hazardous employments covered by the act, and section 114 provided: "The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this State may, subject to the approval and in the manner provided by the Commission and so far as not forbidden by an act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

The defendant has complied with the requirements of the Workmen's Compensation Law of this State, and the Commission made an award of compensation for the plaintiff's injuries, which was being paid. The Supreme Court of the United States reversed *Matter of Jensen v. Southern Pacific Company* (215 N. Y. 514), holding that "The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. \* \* \* The Legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid." (*Southern Pacific Co. v. Jensen*, 244 U. S. 205, 217.) The payment of the compensation by the defendant was stopped and this action was brought.

After the decision in the *Jensen* case Congress amended section 9 of the Judiciary Act of 1789 which had been continued by the United States Revised Statutes, sections 563 and 711, and by the Judicial Code, sections 24 and 256, and which vested in the Federal courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction \* \* \* saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it," by adding to subdivisions 3 of sections 24 and 256 of the Judicial Code, the additional saving clauses, "and to claimants the rights and remedies under the Workmen's Compensation Law of any State." (See 1 U. S. Stat. at Large, 76, 77, § 9; U. S. R. S. § 563, subd. 8; Id. § 711, subd. 3; Judicial Code [36 U. S. Stat. at Large, 1091], § 24, subd. 3, as amd. by 40 id. 395, chap. 97, § 1; Judicial Code [36 U. S. Stat. at Large, 1160, 1161], § 256, subd. 3, as amd. by 40 id. 395, chap. 97, § 2.) The Court of Appeals assumed that Congress acted within its powers and had confided to the States the power to enact and enforce Workmen's Compensation Acts in respect to injuries received in the course of maritime employment. (*Matter of Stewart v. Knickerbocker Ice Co.*, 226 N. Y. 302.) But on writ of error the United States Supreme Court reversed this case, holding the attempted amendment unconstitutional, as a delegation of the legislative power of Congress, and as defeating the purposes of the United States Constitution respecting the harmony and uniformity of the maritime law. (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149.) Therefore, although both of these cases were decided by a closely divided court, five to four, it may be accepted as settled that this plaintiff is not entitled to compensation under the Workmen's Compensation Law (*Matter of Doey v. Howland Co.*, 224 N. Y. 30) and is entitled to enforce whatever other remedy he has for the injuries sustained.

An award under the Workmen's Compensation Law is not made on the theory of a tort committed; compensation is given whether the injury was sustained with or without negligence; it is given upon the theory that the statute providing for the award is read into and becomes a part of the contract. (*Matter of Doey v. Howland Co.*, *supra*, 36.) The test, therefore, applied in the above cases was whether

the contract of employment was of a maritime nature, the true test being the subject-matter of the contract, the nature and character of the work to be done. But as the maritime contracts relate to a subject of exclusive Federal jurisdiction a State statute cannot be read into the contract.

In torts the rule is different. Jurisdiction depends solely on the place where the tort is committed. " 'Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.' " (*Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 60.) In that case the person injured was a stevedore, and the court said: "The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' " (*Id.* 61.) In the instant case the plaintiff was injured because the care required by law was not taken to protect him from injury in his place of work. It was a tort for which a right of action was given at common law. The injury was sustained upon a vessel upon navigable waters, while the plaintiff was engaged in a maritime service. It was, therefore, a maritime tort, to redress which he could pursue his remedy, either *in rem* against the vessel, or *in personam* against the owner, in courts having maritime jurisdiction.

The Appellate Division of the Second Department has stated in a *per curiam* opinion that the State Supreme Court cannot try an action for injuries sustained by reason of a maritime tort; that it is a matter peculiarly within the jurisdiction of the admiralty courts. (*Johnson v. Standard Transportation Co.*, 188 App. Div. 934.) If this is a correct statement then the complaint in this case would have to be



dismissed. The statement was, however, *obiter dictum*. The action had been tried and submitted to the jury as a common-law action for damages for negligence. The jury rendered a verdict for the defendant. On appeal the plaintiff desired to have the case sent back to be tried on an entirely different theory. The court very properly affirmed the judgment because of the plaintiff's election of remedies.

The question of the liability of the master for an injury sustained on shipboard by reason of an insufficient appliance was before this court. (*Simpson v. Atlantic Coast Shipping Co., Inc.*, 191 App. Div. 844, 849.) The majority of the court assumed that the rule of damages would have been the same under the maritime law as that applied upon the trial and affirmed the judgment without determining the question. We can, therefore, consider the questions presented by this appeal unembarrassed by those cases.

Article 3, section 2, subdivision 1, of the Constitution of the United States extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. Article 1, section 8, subdivision 18, gives Congress the power to make all laws necessary for the execution of the powers granted. By section 9 of the Judiciary Act of 1789 the District Courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, \* \* \* saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." This grant was continued by the United States Revised Statutes, sections 563 and 711, and by the Judicial Code, sections 24 and 256. There have been numerous decisions construing this section. (*Waring v. Clarke*, 5 How. [U. S.] 441, 460; *The Moses Taylor*, 4 Wall. 411; *The Hine v. Trevor*, Id. 555; *The Belfast*, 7 id. 624; *Leon v. Galceran*, 11 id. 185; *Steamboat Co. v. Chase*, 16 id. 522; *The Lottawanna*, 21 id. 558; *The Glide*, 167 U. S. 606; *Chelentis v. Luckenbach S. S. Co.*, 247 id. 372.) These cases settle the law to be that actions *in rem*, whether arising under the general maritime law or to enforce liens given by the United States or local State statutes, must be prosecuted in admiralty in the United States courts, while actions *in personam*, arising out of maritime contracts or torts, may be brought in admiralty or on the law side of

the United States court or in a State court having an appropriate common-law remedy. It is the right sanctioned by the maritime law that may be enforced by any court having jurisdiction of the parties or the *res* by the common-law remedies appropriate thereto. This clause gives a right of election of a forum for the enforcement of the maritime right or to remedy the maritime wrong and thereby allows election of the procedure, whereby the matter may be decided. But the complaining party has no right of election to determine whether the defendant's liability shall be measured by common-law standards rather than by those of the maritime law. (*Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 383.) The maritime law as fixed and determined by the acts of Congress and the general maritime law as accepted by the Federal courts constitute part of the national law applicable to matters within the admiralty and maritime jurisdiction. The rights and liabilities arising out of maritime contracts or maritime torts, as recognized and declared by the maritime law, cannot be changed by State statute, nor by substitution of a common-law right or liability.

The instant case is an action for damage for personal injuries, for which there exists in this State a common-law remedy. Therefore, the action may be brought in our Supreme Court, the rules of practice, pleading and evidence of our courts apply, and the cause will be tried in conformity therewith; but the rules relating to contributory negligence, acts of fellow-servants, and the measure of recovery must be determined by the maritime law and not by the common law.

In maritime law contributory negligence of the injured party does not defeat a recovery but goes to a reduction, or more appropriately, an apportionment of the damage. The general rule of the common law exempting the master from liability for injury to a servant by a fellow-servant is not fully applied by the maritime law. And the rules applicable to the recovery, whether of full indemnity, or wages, maintenance and cure, must be taken into consideration, and the relief given according to the rules of maritime rather than common law.

If the case is retried it should be tried with reference to the rules of maritime law applicable to maritime torts.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

DOWLING, LAUGHLIN, MERRELL and GREENBAUM, JJ.,  
concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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PEASE PIANO COMPANY, Respondent, v. GEORGE N. TAYLOR,  
Appellant.

First Department, July 1, 1921.

**Pleadings — motion for judgment on pleadings may be heard before referee appointed to hear and determine issue — court not deprived of jurisdiction to entertain motion — when contract may be considered on motion — principal and agent — action to recover excess of drawing account over and above commissions earned — complaint not stating cause of action — failure to allege express or implied agreement to repay excess of advances over commissions.**

A motion for judgment on the pleadings upon the ground that the complaint does not state facts sufficient to constitute a cause of action can be heard before a referee appointed to hear and determine the issues, since such a referee takes the place of the court, and, in the trial of a cause, has substantially all the powers of a court.

His appointment, however, does not deprive the court of jurisdiction to entertain the motion, and where the plaintiff has delayed noticing the cause for a hearing before the referee for more than fourteen months, the defendant is entitled to a determination on his motion by the justice at Special Term.

A copy of a contract of employment annexed to plaintiff's bill of particulars can be considered on the motion where the plaintiff has stated the contract to be the instrument upon which the action is predicated and has alleged the legal effect thereof in the complaint.

A complaint in an action to recover from a salesman the difference between the amount paid him on a drawing account and the amount of commissions earned and credited to him on such account will be dismissed where it fails to set out an agreement, express or implied, to repay any excess of payments on the drawing account over commissions earned.

APPEAL by the defendant, George N. Taylor, from an order of the Supreme Court, made at the New York Special Term

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and entered in the office of the clerk of the county of New York on the 8th day of April, 1921, denying defendant's motion for judgment on the pleadings.

*John Ewen* of counsel [*Wilder, Ewen & Patterson*, attorneys], for the appellant.

*Bruce Ellison* of counsel [*William B. Ellison* with him on the brief; *Ellison, Ellison & Fraser*, attorneys], for the respondent.

PAGE, J.:

The motion was denied on the ground that it should have been made before the referee appointed to hear and determine the issue, and without prejudice to a renewal of the motion before the referee.

The referee was appointed by an order dated January 5, 1920. This motion was made on March 22, 1921. No notice of a hearing before the referee has been served.

The purpose of section 547 of the Code of Civil Procedure is to enable a litigant at any time after issue joined and before trial to move for judgment on the pleadings, as he could upon the trial. A motion for judgment upon the ground that the complaint does not state facts sufficient to constitute a cause of action could be made before the referee to hear and determine upon the hearing before him. Such "a referee takes the place of the court, and, in the trial of the cause, has substantially all the powers of a court at Special Term or circuit." (*Schuyler v. Smith*, 51 N. Y. 309, 317; *Coffin v. Reynolds*, 37 id. 640.) His appointment, however, does not deprive the court of jurisdiction to entertain the motion. If after a notice of hearing had been served, the party should serve notice of a motion before the court for judgment on the pleadings, the court might very properly decline to entertain the motion and remit the party to his motion before the referee, as the court would do if the motion were made after a cause was on the day calendar for trial. In such a case section 547 would be utilized for delay and not for a speedy determination of the case. In the case under consideration the plaintiff has delayed noticing the cause for a hearing

before the referee for more than fourteen months. The defendant is not required to bring the issues to trial. Whether there is a cause of action alleged against him the defendant is entitled to have determined by the court without waiting, for a longer period of time, for the plaintiff to bring the issues to trial. The justice at Special Term should have heard the motion.

The action is brought to recover from a salesman the difference between the amount paid him on a drawing account and the amount of commissions earned and credited to him on such account. The complaint does not allege an agreement to repay any excess of advances over commissions earned. Annexed to the bill of particulars served by the plaintiff is a copy of the contract of employment. This contract can be considered on the motion. As the plaintiff has stated this to be the contract upon which the action is predicated, the legal effect of which is alleged in the complaint, we can treat it as if a copy were annexed to the complaint and referred to and made a part thereof. (*Dineen v. May*, 149 App. Div. 469, 471; *Wilson & Co., Inc., v. Hartford Fire Ins. Co.*, 190 id. 506, 507; *affd.*, 229 N. Y. 612; *Andersen Trading Co., Ltd., v. Brody*, 193 App. Div. 681, 682.)

This contract so far as pertinent to the question under consideration is as follows:

"Compensation will be based upon the net business done by me at the following rates: [Schedule of rates] payable as follows:

"A drawing account of \$35.00 per week to be charged against commissions earned by me; and a quarterly settlement of any commissions standing to my credit on the first day of September, December, March, and June of each year; but it is expressly understood that the Pease Piano Company are to retain to offset chargebacks, 20% of the commissions earned by me during the quarter given me in settlement.

"It is further understood that the Pease Piano Company may reduce the drawing account above mentioned should I fail to earn sufficient commissions during the quarter to cover."

There is no agreement to pay back any excess of payments on the drawing account over commissions earned. The sole

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right that the plaintiff reserved was to reduce the drawing account should the defendant fail to earn sufficient commissions during any quarter to cover the amount paid. There is no personal liability of the defendant to repay the sum, and the same is payable out of commissions and not otherwise.

It is well settled that without an agreement express or implied to repay the excess of a drawing account over and above commissions earned, the employer cannot recover such excess from the employee. (*Northwestern Mutual Life Ins. Co. v. Mooney*, 108 N. Y. 118; *Wolfsheimer v. Frankel*, 130 App. Div. 853, 856.)

The facts alleged in the complaint with the contract set forth in the bill of particulars are insufficient to constitute a cause of action. The order will, therefore, be reversed, with ten dollars costs and disbursements, and the motion for judgment in favor of the defendant dismissing the complaint granted, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

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CHARLES L. POWELL, Respondent, v. C. P. HUGO SCHOELLKOPF, Appellant.

Fourth Department, May 4, 1921.

**Pleadings — extension of time to serve answer — defendant does not have absolute right — court will not grant extension where purpose is for delay — court may modify order and impose conditions — conditions may be imposed on opening default.**

The provisions of the Code of Civil Procedure, sections 542 and 781, and of the General Rules of Practice, rule 24, granting extra time to a defendant in which to plead do not confer absolute rights upon him. Those rights are granted as a favor to prevent an injustice being done, and extra time will be granted only upon good cause shown.

The court will not lend its authority to aid the defendant in his manifest purpose of delaying the trial of the action beyond the term when it could

have been tried, but he should be given an opportunity to defend and a fair day in court, and being in default and in court asking favors, it is proper to impose as a condition of opening the default and permitting him to answer that he will not seek further to delay the plaintiff in his remedy. The justice who granted the order extending the defendant's time to answer had the power to modify it and in the exercise of his discretion had the right to annex thereto the condition that the defendant should not, by obtaining extensions of time or otherwise, impede plaintiff's right to have the action tried at the next Trial Term and that the attorney for the defendant should accept service of notice of trial for that term. In opening defendant's default, in answering, it was proper to impose such reasonable conditions in the interest of justice as the court deemed right.

APPEAL by the defendant, C. P. Hugo Schoellkopf, from an order of the Supreme Court, made at the Ontario Special Term and entered in the office of the clerk of the county of Ontario on the 22d day of April, 1921, modifying an order granted on the 24th day of March, 1921, so that the defendant should have fifteen days to answer, upon certain terms and conditions; also from an order made at the Erie Special Term and entered in said clerk's office on the same day modifying the last-mentioned order on certain terms and conditions, and also from an order made at the Monroe Special Term and entered in said clerk's office on the 19th day of April, 1921, denying defendant's motion for a modification of said last-mentioned order.

*Shire & Jellinek* [*Simon Fleischmann* and *B. Frank Dake* of counsel], for the appellant.

*William W. Armstrong*, for the respondent.

DAVIS, J.:

On March 4, 1921, the plaintiff brought this action, laying the venue in Ontario county, where he resided. The complaint set forth a cause of action for fraud and deceit and for unlawful and oppressive acts of the defendant as majority stockholder of a corporation.

In brief, the claim of the plaintiff is that he, with two associates, were the stockholders in a large corporation, of which he was president, the defendant holding a minority of the stock; that the other stockholder desired to retire, and that the defendant, aided by his attorney, conducted certain

negotiations whereby the defendant obtained control of the corporation, and deprived the plaintiff of the use and income of his property, and ousted him from his position of president, with the consequent loss of salary, and will eventually obtain title to the plaintiff's stock, all to his great damage.

The defendant, who resides in Buffalo, instead of pleading within twenty days, upon an affidavit made by his attorney in the usual form, but incorrectly stating that the next term of court in Ontario county would be held June 6, 1921, obtained from a justice of the eighth district on the last day an order *ex parte* extending his time to answer for twenty days, and served the order with a notice of appearance on the plaintiff's attorney.

The plaintiff's attorney, believing that the order was obtained for the purpose of delay, went before the same justice and applied *ex parte* for an order modifying the previous order, showing that the extension granted would very likely result in the cause passing the term of court appointed to be held in Ontario county on May second, with the result that the justice modified the order giving the defendant fifteen days' additional time to answer, but not to demur or otherwise plead, and upon condition that the defendant should not, by obtaining further extensions of time, or by amendment of such answer, or otherwise, impede plaintiff's right to have such action tried at the next Trial Term in Ontario county, appointed to be held May second, nor in any manner prevent such trial.

On April seventh the defendant's attorney, being perilously near the end of the time granted by the last order, and having failed to have his answer prepared, obtained a show-cause order asking for additional time, and on a hearing before the same justice obtained, on April eleventh, a further modification of the order, which provided that he should have six days' additional time, so he might answer on April fourteenth, with the same conditions imposed, and further that the attorney should accept service of a notice of trial for the May Trial Term.

The plaintiff noticed the case for trial and placed it on the calendar of the Ontario Trial Term. The defendant on April fourteenth (again his last day to answer) obtained an order to show cause returnable before a Special Term in the seventh



district, whereby he sought to have vacated or modified the previous orders made, and opening his default and further extending his time to plead. His motion was denied on April fifteenth, but he was relieved of his default in not answering on April fourteenth, upon condition that he serve his answer on or before April twentieth.

This, stated as briefly as possible, completes the story of the attempts of the defendant to delay his pleading, except that he has failed to serve an answer and applied *ex parte* on April eighteenth, just before the time to answer again expired, to an associate justice of this court, and obtained a stay pending the argument of this appeal. From the three orders above enumerated the defendant appeals, claiming he has been deprived of his legal rights to demur; that he has not had time to prepare his answer, because of the absence of the defendant and the many and important engagements of his counsel.

On the other hand, it is claimed on the part of the plaintiff that he has been rendered destitute by the machinations of the defendant and those acting for him; that the cause of action is simple, and an answer putting in issue the allegations of the complaint could be readily drawn; and that the conventional excuse of an absent client is not very persuasive here because the attorney for the defendant was present and advising at all the interviews between the parties on the occasions involved in the cause of action, and had personal knowledge of all the transactions between the parties, and participated with defendant in the division of plaintiff's property obtained by the fraud and deceit alleged, and shortly after became a director of the corporation. The plaintiff's counsel asserts in an affidavit, and it is not denied, that as early as February last he went over the facts in this litigation with the defendant's attorney, who was fully aware of all the facts at that time, when an effort to reach some settlement was being made.

Probably no provisions of our present Code have been oftener resorted to by those who wish to obtain the benefit of the law's delays and thereby vex, oppress and discourage honest suitors, than the provisions permitting amendments as of course and extensions of time by order. The latter have

too often been improvidently granted. These remedies were wisely provided, so that those who in exceptional cases, in good faith, were unable to prepare their pleadings within the twenty days allowed by statute (Code Civ. Proc. § 520), might be afforded relief in emergencies. Where there is good faith and comity between attorneys, stipulations extending time are granted for the asking, if there be a willingness on the other side to reach a speedy trial of the issues in difference between the parties.

These provisions granting extra time do not confer absolute rights on a delinquent party. They are granted as a favor, to prevent an injustice being done, upon good cause shown. (Code Civ. Proc. §§ 542, 781 *et seq.*; General Rules of Practice, rule 24.) They imply absolute good faith on those who seek their beneficial relief and a willingness to aid the other party in obtaining his rights.

In all cases where the parties are seeking it, it is the duty of the courts to afford an opportunity for a speedy adjudication of the differences between them,—as speedy as is possible, considering other causes also pressing, and the right of a party to become prepared for trial, and to have his fair day in court. Particularly is this true in cases where the party seeking relief is aged, infirm or destitute, and obtaining relief in his lifetime is imperative. The criticism of both the thoughtless and the thoughtful is more directed to the delays afforded by our judicial system than to any or all other imperfections. Time must always be an element in reaching just decisions, but the courts should not encourage any dilatory practices on the part of litigants and their attorneys.

It was not at all necessary that the defendant be present, if the attorney wished to demur to the complaint. A demurrer is a simple pleading, readily prepared. It required no statements of the facts, and the client could give no advice on the law, when deciding whether or not the complaint was demurrable. In fact, when making his first application for an extension of time, the attorney said nothing about demurring. He merely said he had been unable, owing to his own engagements and the absence of his client on account of his health, to prepare and serve an answer, and that from conversations with the defendant with reference to the facts of the case,

he believed the defendant had a good and substantial defense on the merits. It is evident that the desire to demur, if any ever existed, is entirely an afterthought, and the much talk we have heard on the subject of this valuable right being lost, is for effect.

There must have been some time within the first twenty days, or within twenty-six additional days granted by the several orders, when an answer could have been prepared in consultation with the client, if consultation was needed. It seems that there had been a consultation before the attorney applied for the first order, and the defendant was in Erie county and made an affidavit on April thirteenth, but, if the defendant was absent, the attorney, being familiar with the facts, could have prepared the answer and sent it to the defendant for verification, and he would need to be far distant not to receive it and return it in ample season.

As for the manifold engagements of counsel, perhaps all that it is necessary to say is that, if but a small fraction of the time expended in making and arguing the numerous motions and preparing this appeal had been utilized in preparing an answer, the defendant would not now be in the position he finds himself. If that position is embarrassing to the defendant, he may place the blame on the dilatory tactics employed in his behalf, which a simple recital of the facts portrays.

It is too obvious that the main purpose of all concerned on the part of the defendant has been to devise some method, protected by our rules of practice, of getting this case continued beyond the Ontario May term. We cannot lend the authority of the court to such manifest purposes of delay. The defendant is now in default, the stay of proceedings not extending his time (*McGown v. Leavenworth*, 2 E. D. Smith, 24, 31; *Nichols Practice*, 938), and is in court seeking favors. He should be given an opportunity to defend and a fair day in court, but on condition that he will not seek to delay the plaintiff in his remedy.

The justice who granted the order had power to modify it, and in the exercise of reasonable discretion had the right to annex conditions to the favor sought by the defendant, so long as he did not prohibit any legal defense. (*Parmenter v.*

*Roth*, 9 Abb. Pr. [N. S.] 385.) The defendant could have rejected the order and answered immediately; instead he elected to take the extension of time, but has sought to reject the conditions. By failing to serve his answer, he has taken the benefit of the orders, and cannot now be heard to complain of the conditions imposed upon him. I find no abuse of discretion on the part of the justice in making the orders appealed from; rather I think the course adopted was one which would prevent unnecessary delay and promote the ends of justice.

While actions cannot be tried until they are at issue, in opening a default the courts may impose such reasonable conditions in the interests of justice as they deem fit. One who asks an order, which a court may in its discretion grant or refuse, must, if he obtains it, submit to the conditions which the court imposes. (*Brownell v. Ruckman*, 85 N. Y. 648; *Dembitz v. Orange County Traction Co.*, No. 2, 147 App. Div. 588; *Matter of Prentice*, 155 id. 480.)

The defendant should have three days after service of a copy of the order of this court in which to prepare and serve his answer, on condition that he submit himself to the jurisdiction of the Ontario May Trial Term, without question on the time of pleading or the date of issue, failing which he may be regarded as in default in pleading. The Trial Term will have authority to hear the defendant's application for time for preparation and to fix the day of trial in its discretion.

The orders appealed from are affirmed, with ten dollars costs on each order, and printing disbursements, and with leave to defendant to answer within three days under the condition stated in the opinion.

All concur; LAMBERT, J., not sitting.

Orders affirmed, with ten dollars costs on each order and printing disbursements, with leave to the defendant to answer within three days after service of a copy of this order with notice of entry, upon condition that he submit himself to the jurisdiction of the Ontario May Trial Term, without question on the time of pleading or date of issue, failing which he may be regarded as in default in pleading.

THEODORE MICHAELS, Respondent, v. CHARLES FLACH, as Sole Executor, etc., of CHRISTOPHER KIENZLE, Deceased, Appellant.

Second Department, June 27, 1921.

**Executors and administrators — Supreme Court has jurisdiction of action on claim against decedent — Surrogate's Court does not have exclusive jurisdiction — parent and child — estate of father liable to third person for necessities furnished child — separation agreement no defense for necessities furnished after death of mother.**

The Supreme Court has jurisdiction of an action against an executor on a claim against the testator which was presented to the executor but neither rejected nor accepted and approved.

The Surrogate's Court does not have exclusive jurisdiction over such a cause of action.

The estate of a father is liable for necessities furnished by a third person to his minor child prior to the father's death, and a separation agreement between the father and the mother providing for a pecuniary allowance for the support of the mother and child is no defense to the action for necessities furnished after the death of the mother leaving no property.

APPEAL by the defendant, Charles Flach, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 16th day of February, 1921, on the decision of the court rendered after a trial at the Kings Trial Term without a jury.

The action is brought by the plaintiff, who is uncle to John C. Kienzle, the infant son of defendant's testator, to recover moneys expended in necessities for the infant. On May 31, 1904, the testator and his wife, Evelyn, now deceased, entered into articles of separation, wherein the wife, in consideration of a sum of money, released her husband, defendant's testator, from all claims for the support and maintenance of herself and child during her lifetime. The parties separated, the wife taking the infant, then about two years of age, with her. The wife died on November 9, 1911, leaving no estate or property, and from that time the plaintiff has maintained and educated the infant. The defendant's testator never communicated with his wife nor inquired about

his son from the time of the separation. After the death of the mother the plaintiff made diligent but fruitless efforts to locate the father.

The defendant's testator died on December 29, 1917. On June 14, 1919, plaintiff duly filed with the defendant a verified claim for \$2,218 for the board, maintenance and education of the minor son. The defendant neither rejected nor accepted and approved the claim, and this action was brought to recover the amount on January 3, 1920.

*Louis J. Halbert*, for the appellant.

*Patrick J. O'Beirne*, for the respondent.

BLACKMAR, P. J.:

It is argued by the appellant that the Surrogate's Court had exclusive jurisdiction over the cause of action. With this we cannot agree. The general jurisdiction in the Supreme Court, secured to it by article 6, section 1, of the Constitution, is not affected by the legislation regulating practice in the Surrogate's Court. The only effect of these statutes upon the right to maintain an action in a court of general jurisdiction upon a claim against a decedent's estate is to prescribe a short Statute of Limitations in case a claim is presented and rejected, or in case an objection to the allowance of a claim by the representative is sustained by the surrogate. (Code Civ. Proc. §§ 2680, 2681.) In the last analysis the jurisdiction conferred on the surrogate by subdivision 4 of section 2510 of the Code of Civil Procedure is exercised only by consent of the claimant. In case a claim is made and rejected or is allowed by the representative, and an objection thereto sustained by the surrogate, the jurisdiction of the Surrogate's Court to determine the claim upon the judicial settlement of the accounts of the executor or administrator depends on the forbearance of the claimant to bring an action within the time limited therefor by section 2681. This forbearance is equivalent to a consent that the claim be adjudicated by the Surrogate's Court.

Neither the amount of the plaintiff's claim nor that the claim was for necessities was disputed at the trial or on this appeal. The law of this State on the subject of the parent's

liability for necessities is stated by the Court of Errors in *Van Valkinburgh v. Watson* (13 Johns. 480) as follows: "A parent is under a natural obligation to furnish necessities for his infant children; and if the parent neglect that duty, any other person who supplies such necessities is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent." (*De Brauwere v. De Brauwere*, 203 N. Y. 460.) The record abundantly shows that the parent has neglected the duty. The agreement with the wife did not relieve him from the duty. The pecuniary allowance which he made in the articles of separation may have been evidence of what he did toward performance; but even that ended with the death of the wife leaving no property. From that time the duty existed unimpaired, and nothing was done by the testator toward discharging it. In other words, the duty was neglected, and under the doctrine above set forth the law raises an implied promise to reimburse the plaintiff, who supplied the necessities.

The judgment should be affirmed, with costs.

Present — BLACKMAR, P. J., RICH, KELLY, JAYCOX and MANNING, JJ.

Judgment unanimously affirmed, with costs.

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E. V. WEBB and DIBRELL BROS., INC., Trading as E. V. WEBB & COMPANY, Appellants, v. A. FRIEDBERG and MAX FRIEDBERG, Copartners, Trading as A. FRIEDBERG & BRO., Respondents.

First Department, July 1, 1921.

**Pleadings — action to recover price of goods sold — evidence admitted without objection establishing purchase of part of goods by plaintiffs as agent for defendants — amendment of complaint on trial should have been permitted — recovery under complaint without amendment not authorized — judgment in favor of plaintiffs reversed though proper in part, so as to save to plaintiffs benefit of attachment.**

Where in an action to recover the purchase price of goods sold and delivered evidence is presented and admitted without objection on the part of the plaintiffs showing that as to a part of the claim the goods were purchased

by the plaintiffs as agent for the defendants and the plaintiffs' claim as to that part is for the price of the goods in addition to commissions, the plaintiffs should be permitted on the trial to amend their complaint to conform to the proof.

The judgment, which as to a part of the cause of action was in favor of the plaintiffs, should be reversed and a new trial granted, for if the judgment is permitted to stand as to that part of the cause of action in question here, which is in favor of the defendants, because of a technical defect in the complaint, the plaintiffs will lose the benefit of a warrant of attachment and the levy thereunder against the defendants, who are non-residents.

APPEAL by the plaintiffs, E. V. Webb and another, from so much of a judgment of the Supreme Court in their favor, entered in the office of the clerk of the county of New York on the 14th day of April, 1921, upon the verdict of a jury rendered by direction of the court, as disallows certain of their claims against the defendants.

*James A. O'Gorman* [*George Gordon Battle* and *Leon N. Futter* with him on the brief; *O'Gorman, Battle & Vandiver*, attorneys], for the appellants.

*Charles H. Sachs* [*Edward N. Perkins* with him on the brief; *Rhinelanders, Durkin & Perkins*, attorneys], for the respondents.

LAUGHLIN, J.:

The complaint is in two counts. The first is for the agreed price and the second for the fair and reasonable value of tobacco alleged to have been sold and delivered by the plaintiffs to the defendants. The amount claimed in each count is the same, namely, \$61,101.63, less \$11,060.13 paid on account, and judgment is demanded for \$50,041.50, the balance, together with interest. Eight separate items are involved in the action. The first two items related to two invoices of tobacco by the plaintiffs to the defendants on the 10th of December, 1919, the third to tobacco so invoiced on January 3, 1920, and the fourth to tobacco so invoiced on the 29th of January, 1920. With respect to those four items the evidence is uncontroverted that the sales by the plaintiffs to the defendants were of tobacco owned by the plaintiffs



at the time of the transactions, and for them a recovery has been allowed by the verdict as directed. With respect to those items the invoices contained no charges for commissions by the plaintiffs and no commissions have been recovered. Two of the remaining items relate to tobacco claimed to have been invoiced by the plaintiffs to the defendants on the 10th of February, 1920. The remaining items relate to invoices of tobacco claimed to have been made by the plaintiffs to the defendants on the 11th of February, 1920. With respect to those four items the evidence on the part of the plaintiffs, which stands uncontroverted and was received without objection or exception, shows that the plaintiffs were employed by the defendants as commission agents to purchase and handle the tobacco including drawing it through a machine and packing it in hogsheads; that they so purchased it paying cash therefor and so prepared it and placed it in a warehouse and invoiced it to the defendants by invoices showing the purchase price and their charges for commissions, which were the customary charges for such services, and transmitted to the defendants the invoices and warehouse receipts for the tobacco showing that it had been paid for and was held for the defendants, and that the defendants had insured the tobacco as their own. If this were a sale by plaintiffs these facts would show sufficiently that title had passed to defendants and that they had accepted the tobacco (*White v. Schweitzer*, 221 N. Y. 461, 465; *Turner-Looker Co. v. Aprile*, 195 App. Div. 706) and they sufficiently show performance on the theory of agency in purchasing to entitle plaintiffs to recover. The plaintiffs at the close of their evidence asked leave to amend the complaint by alleging for their commissions on account of the purchase of this tobacco and that as agents for the defendants they advanced and paid the purchase price thereof. Defendants objected, but did not claim surprise. The motion was denied and plaintiffs excepted. The defendants then moved for a dismissal of the complaint in so far as it related to these four items on the ground that the complaint proceeded on the theory of sales of tobacco by the plaintiffs to the defendants, and that the evidence instead of showing such sales showed that the plaintiffs as to those transactions acted as the agents of the defendants, and that

since the evidence did not conform to the allegations of the complaint, plaintiffs could not recover therefor. That motion was denied and thereupon the defendants rested and both parties moved for a direction of a verdict and it was stipulated that the jury might be discharged and that briefs be submitted and that the court might direct a verdict without the presence of a jury. The court thereafter directed a verdict for the plaintiffs as has been stated. The evidence to the effect that the plaintiffs purchased and paid out their own money for the tobacco, which was received without objection or exception, was not germane to the issues as presented by the complaint and answer, and since no objection was interposed to the evidence, it was competent for the trial court to allow the amendment requested, which was properly formulated and presented (*Baumann v. Tannenbaum*, 125 App. Div. 770), and we think it should have been allowed. The appellants claim that these items having been eliminated on the defendants' motion for the direction of a verdict in their favor thereon, and not on their motion to dismiss the complaint as to them, the plaintiffs were entitled without amending the complaint to the benefit of all the evidence received without objection, and there are authorities tending to support that contention. (See *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Frear v. Sweet*, 118 id. 454; *Gillies v. Improvement Co.*, 147 id. 420; *Butler Brothers v. Hirzel*, 87 App. Div. 462; *affd.*, 181 N. Y. 520; *Gross v. R. & S. Outfitting Co.*, 140 N. Y. Supp. 115.) But the plaintiffs by thus endeavoring to amend recognized that the cause of action shown was on a contract of agency to represent defendants in purchasing the tobacco, and doubtless the defendants rested, without offering any evidence, relying on the denial of plaintiffs' motion to amend, and it is quite probable that the verdict for defendants as to those items was directed on the theory that plaintiffs were not entitled to recover therefor without amendment. We are of opinion, therefore, that the defendants should be afforded an opportunity of meeting the plaintiffs' case on the theory presented by their proposed amendments, which should have been allowed. Counsel for appellants now contends that they were entitled to recover under the complaint without any amendment, but we think not, for the evidence shows

a contract of agency only with an agreement by plaintiffs to hold the tobacco for defendants for a limited period. The defendants were non-residents of the State, and on that ground the plaintiffs obtained a warrant of attachment and made a levy thereunder. Of the benefit of that warrant of attachment and levy they will be deprived if the judgment is allowed to stand, and they might be unable to obtain jurisdiction over the defendants here in another action. Defendants offered no evidence. They should not be permitted to defeat plaintiffs' right to recover, which has been plainly shown, on this technical point of pleading, for it is manifest that they must have well understood that the plaintiffs had paid for the tobacco and that their only liability therefor was to the plaintiffs. It follows that the judgment should be reversed and a new trial granted, with costs to appellants to abide the event, with leave to plaintiffs to amend as requested on the trial.

CLARKE, P. J., DOWLING, MERRELL and GREENBAUM, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event, with leave to plaintiffs to serve amended complaint within twenty days from entry of order.

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GEORGE H. FLETCHER and ALFRED LOCKWOOD BROWN,  
Respondents, v. THE MANHATTAN LIFE INSURANCE COM-  
PANY, Appellant.

First Department, July 1, 1921.

**Equity — suit to establish trust and for accounting — parol agree-  
ment by defendant to bid in property on foreclosure and convey  
to plaintiffs — Statute of Frauds not defense — plaintiffs need not  
show ability to bid in property on the sale.**

A parol agreement entered into between the plaintiffs and the defendant, who were all interested in a mortgage, whereby the defendant agreed to bid in the mortgaged property on the foreclosure sale and to convey the premises to the plaintiffs or their nominee within a certain time, is enforceable in equity, since should the defendant be permitted to interpose the invalidity of the agreement on the ground that it was not in writing

it would constitute a fraud on the plaintiffs, and, therefore, equity will imply a trust and regard the defendant as a trustee *ex maleficio*. It was not necessary for the plaintiffs in a suit to have it declared that the defendant holds the property as trustee and for an accounting, to allege that they could have bid in the property or have had it bid in for them and have thus protected their interests on the mortgage foreclosure sale; it is no part of the plaintiffs' case to show ability in that regard.

APPEAL by the defendant, The Manhattan Life Insurance Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of February, 1921, denying defendant's motion for judgment on the pleadings.

*D. Theodore Kelly* [*Henry W. Kennedy*, attorney], for the appellant.

*James H. Richards* [*Fletcher, McCutchen & Brown*, attorneys], for the respondents.

LAUGHLIN, J.:

The pleadings consist of the complaint and answer and a reply thereto. The complaint shows that in a foreclosure action brought by the defendant in the Supreme Court in which plaintiffs and their former partner, to whose rights they have succeeded, were defendants, it was decided that the plaintiff therein and said defendants were jointly entitled to a judgment of foreclosure of the mortgage, to foreclose which the action was brought, and that the mortgaged premises, which were known as the Mt. Morris apartment house at Fifth avenue and One Hundred and Twenty-sixth street, be sold at public auction by a referee and that from the proceeds of the sale the defendant herein should be paid \$193,499.77 and that plaintiffs and their former partner should be paid \$39,019.59 for their interest in the bond and mortgage; that prior to the time set for the sale it was agreed between the plaintiffs and the defendant herein that defendant should bid in the property at a sum not in excess of the amount due, including all payments and disbursements required to be made, and that defendant should convey the premises to the plaintiffs or their nominee within thirty days for the amount paid by it and that title on such conveyance should be closed

as of the date of the foreclosure sale and that payment should be made to defendant by a bond payable on the 18th of September, 1914, with interest at five and one-half per cent for \$185,000, secured by a mortgage on the premises, and the excess cost should be paid in cash or by certified check, and that such bond and mortgage were to be executed for \$210,000, and that plaintiffs were to be given a participation agreement for \$25,000 thereof. It is also alleged that the agreement contained other provisions with respect to the administration of the property in the meantime and providing that the plaintiffs should take further participating interests in the defendant's interest in the bond and mortgage and for the payment of attorney's fees and for a guaranty of the loan thus to be made by the defendant to the plaintiffs. It is further alleged that thereafter both parties attended the sale, and plaintiffs and defendant there agreed upon the bid to be made by defendant, and that plaintiffs relying on the agreement refrained from bidding and permitted the premises to be purchased by the defendant at its bid upon which the parties had so agreed and permitted it to take title; that plaintiffs have been ready, willing and able at all times to perform and have at divers times tendered performance, but defendant declined and refused to perform on its part and without notice to the plaintiffs and in violation of its agreement has sold and transferred the premises and has converted the entire proceeds to its own use and has failed and refused, after due demand made, to account to plaintiffs for the sale; that the premises are worth not less than \$250,000, and defendant has been in possession and has received the rent, income and proceeds since April 1, 1914, and has not accounted therefor.

The prayer for relief is that it be adjudged that defendant received the premises as trustee for plaintiffs, and that it account to them for the rents and other income and pay them the value of the premises in excess of the cost thereof to defendant. The answer puts in issue the making of the agreement on which plaintiffs rely and quotes it from plaintiff's bill of particulars, setting it forth in writing as claimed to have been agreed upon but without any signature, and alleges that any trust for plaintiffs was not granted or

declared by deed or conveyance or any instrument in writing subscribed by the defendant or its authorized agent and is, therefore, void under the Statute of Frauds. (See Real Prop. Law, § 242.) The reply, in effect, alleges that the formal agreement in writing as set forth in plaintiffs' bill of particulars and quoted in the answer was prepared, but denies any knowledge or information sufficient to form a belief as to whether it was signed by or in behalf of the defendant, admitting, however, that no such signed agreement was delivered to plaintiffs, and alleges that the agreement was partly performed by the plaintiffs and they are ready to complete performance and, therefore, it is not required to be in writing.

It is not alleged that the defendant fraudulently intended to mislead plaintiffs by making and then refraining from carrying out the agreement; but on the facts alleged if defendant should be permitted to interpose the invalidity of this agreement as a defense it would constitute a fraud on the plaintiffs and, therefore, equity should imply a trust and regard the defendant as trustee *ex maleficio*. It was so held on analogous facts in *Ryan v. Dox* (34 N. Y. 307) and in *Congregation Kehal Adath v. Universal B. & C. Co.* (134 App. Div. 368, 370). In the latter of those cases the express terms of the agreement extended to an agreement on the part of one party not to bid or to procure bidders on the sale. An agreement to that effect was, I think, here fairly implied (See *Wood v. Duff-Gordon*, 222 N. Y. 88), and, therefore, I see no distinction in principle between those cases and this. In *Wheeler v. Reynolds* (66 N. Y. 227) it seems to have been held that there must be an express agreement to refrain from bidding or the party must have done or omitted something in reliance upon the parol agreement, such as failing to attend the sale or to obtain other bidders, and must allege it. Under the more liberal modern rule declared in *Wood v. Duff-Gordon* (*supra*) I think the facts alleged show that there plainly was an implied agreement to that effect, which is sufficient. In *Woolley v. Stewart* (222 N. Y. 347) the Court of Appeals has attempted to prescribe as a rule that evidence will not be received to show a parol contract if the act admits of explanation without requiring parol evidence, but that was

an action for specific performance of a contract, and this is not an action to enforce the contract but to call the defendant to account in order that it shall not be permitted to defraud plaintiffs of their interest in the mortgage which was foreclosed, and the general rule is that equity will afford relief where necessary to prevent a fraud. (*McKinley v. Hessen*, 202 N. Y. 24.) Here it seems that the only doubt there can be is with respect to whether it was necessary for plaintiffs to allege that they could have bid in the property or have had it bid in for them and have thus protected their interests. Assuming, as we must, that the agreement was made as alleged, it is perfectly plain that it was contemplated by both parties that the plaintiff should neither bid nor procure bidders in competition with the defendant who was to bid both for itself and them. The agreement having been made, it was not incumbent upon the plaintiffs to endeavor to raise funds or to procure them to be raised by others for the purpose of buying the premises. It is, therefore, I think, no part of the plaintiffs' case to show ability so to do. They had a substantial interest in the mortgage and the defendant should not be permitted to cheat or defraud them of that interest by inducing them to rely upon its parol agreement to protect it in the manner alleged. There is a plain distinction between a case in which such a parol agreement is made with a party who has an interest in the mortgage and one in which parties having no interest agree by parol that one of them shall bid in property for the benefit of both, in which case neither law nor equity affords relief against the breach of the agreement. (*Levy v. Brush*, 45 N. Y. 589; *Sturtevant v. Sturtevant*, 20 id. 39.) That distinction is recognized in *Wheeler v. Reynolds* (*supra*). The point presented for decision on the motion is the sufficiency of the complaint on the theory that the agreement rested in parol. I am of opinion that the complaint states a cause of action and that the motion was properly denied. It follows that the order should be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Order affirmed, with ten dollars costs and disbursements.

SARAH WATKINS, an Infant over the Age of Fourteen Years,  
by HANNAH BRENNER, Her Guardian ad Litem, Appellant,  
v. THEODORE WATKINS, Respondent.

First Department, July 1, 1921.

**Husband and wife — marriage — annulment under Code of Civil Procedure, § 1750, on ground that consent was obtained by fraud — husband refusing to keep his promise to have religious ceremony performed after civil ceremony — marriage not consummated — fraudulent representations.**

A marriage may be annulled under section 1750 of the Code of Civil Procedure, on the ground that the consent of the plaintiff was obtained by fraud, where it appears that the plaintiff consented to marry the defendant only on condition that the marriage ceremony should be performed according to the Jewish religion and rites, and by a Jewish rabbi, and the defendant agreed that such ceremony would be performed after a civil ceremonial marriage, but after the performance of the civil marriage he refused to have the marriage ceremony performed by the Jewish rabbi and the parties separated without consummating the marriage by cohabitation.

Where a party to a marriage contract is induced to enter into it relying upon the fraudulent representations made by the other party with respect to his intentions concerning future actions, but for which consent the execution of the contract would not have been given, and the marriage contract is never consummated, that is deemed a fraudulent representation with respect to a material existing fact sufficient to warrant the annulment of the marriage for fraud.

APPEAL by the plaintiff, Sarah Watkins, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 27th day of January, 1921, upon the decision of the court rendered after a trial at the New York Special Term.

*Herman Turkel*, for the appellant.

No appearance for the respondent.

LAUGHLIN, J.:

This is an action for the annulment of a marriage between the plaintiff and the defendant on the ground of fraud. The summons was duly served on the defendant, who duly filed



a notice of appearance by attorney but defaulted in answering and failed to appear on the trial. On the 14th of November, 1918, plaintiff, who resided in the borough of Manhattan, New York, and was eighteen years of age, was requested by the defendant to marry him and she refused to consent excepting upon condition that the marriage ceremony should be performed according to the Jewish religion and rites and by a rabbi and he agreed that such a marriage ceremony would be performed after a civil ceremonial marriage and also promised her mother, who likewise gave her consent on the same condition. On that day plaintiff and her mother went to the City Hall pursuant to appointment with the defendant and there met him and his mother and duly obtained a marriage license and the plaintiff's mother signed a consent to the marriage and the plaintiff and the defendant were there duly married by an alderman. Plaintiff testified that she was then eighteen years of age and, if so, the consent of her parents was unnecessary, but doubtless it was required by the city clerk as a precautionary measure lest she may have misrepresented her age. (Dom. Rel. Law, § 15, as amd. by Laws of 1917, chap. 503.) The defendant, although repeatedly requested after the civil ceremony to perform his promise for a Jewish ceremonial marriage, refused so to do and the parties separated, plaintiff returning home with her mother and the marriage was not consummated. On testimony to this effect by plaintiff and her mother, the trial court found that the plaintiff was induced to marry the defendant on the distinct understanding and promise by him that the civil marriage was to be followed within a period of two or three days by a ceremonial marriage in accordance with the Jewish religion and rites and by a Jewish rabbi and that said promise was made by the defendant with the intent to deceive and defraud the plaintiff and with the intent on his part not to carry out his promise to have such religious ceremonial marriage, and that he obtained her consent to the civil marriage by said fraud and deceit, and that in consenting to the civil ceremonial marriage plaintiff relied upon said promise of the defendant.

Section 1750 of the Code of Civil Procedure authorizes in an action by the party defrauded, among other things, the annulment of a marriage on the ground that the consent of

one of the parties was obtained by fraud and it has been authoritatively held that this authorizes the annulment of a marriage for any fraud or deception which would invalidate or authorize the cancellation of any contract. (*DiLorenzo v. DiLorenzo*, 174 N. Y. 467; *Svenson v. Svenson*, 178 id. 54.) In *DiLorenzo v. DiLorenzo* (*supra*) the Court of Appeals held that the fraud which authorizes the annulment of a marriage under section 1750 of the Code of Civil Procedure must be material to inducing the making of the contract, and on that point, at pages 471, 472 and 474, after quoting the statutory provisions, said: "This language is broad and warrants but the one reasonable construction, that the fraud must be material to that degree that, had it not been practiced, the party deceived would not have consented to the marriage. \* \* \*

The free and full consent, which is of the essence of all ordinary contracts, is expressly made by the statute necessary to the validity of the marriage contract. The minds of the parties must meet in one intention. It is a general rule that every misrepresentation of a material fact, made with the intention to induce another to enter into an agreement and without which he would not have done so, justifies the court in vacating the agreement. It is obvious that no one would obligate himself by a contract, if he knew that a material representation, entering into the reason for his consent, was untrue. There is no valid reason for excepting the marriage contract from the general rule. \* \* \*

Our attention has been called to cases in the courts of this State and of other States, which seem to hold a different doctrine upon the subject of the judicial annulment of a marriage contract. Whatever may be said in explanation, or in differentiation, I think it is sufficient that we rely upon the plain provision of our statute and upon the application to the case of a contract of marriage of those salutary and fundamental rules, which are applicable to contracts generally when determining their validity. If the plaintiff proves to the satisfaction of the court that, through misrepresentation of some fact, which was an essential element in the giving of his consent to the contract of marriage and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized, the court is empowered to annul the marriage." In *Domschke v. Domschke* (138 App.

Div. 457) the court in considering what is fraud within the contemplation of a statute, quoted from Parsons on Contracts (Vol. 2 [8th ed.], p. 895) as follows: "If the fraud be such that, had it not been practiced, the contract would not have been made, or the transaction completed, then it is material to it; but if it be shown or made probable that the same thing would have been done by the parties, in the same way, if the fraud had not been practiced, it cannot be deemed material." It has been held by the trial courts in some cases that the fraudulent misrepresentation must be with respect to a material, existing fact and that it is not sufficient where it consists of a fraudulent promise with respect to a future act (*Schachter v. Schachter*, 109 Misc. Rep. 152; *Neletta v. Neletta*, N. Y. L. J., June 15, 1918), and in others it has been held that such fraud as was here alleged and proved is sufficient. (*Rubinson v. Rubinson*, 110 Misc. Rep. 114; *Cohen v. Cohen*, Sup. Ct., N. Y. County, Index No. 35955, 1917.) Here, plaintiff and her mother were orthodox Jews and the plaintiff was within her right in refusing to marry the defendant unless he consented to a marriage ceremony performed in accordance with her religion. Of course, if plaintiff had consented to the consummation of the marriage without the performance of the promise concerning the religious ceremony, that would constitute a waiver of the fraud and preclude the maintenance of the action, for she would necessarily know before consenting to such cohabitation that the defendant had been guilty of a fraud. (Code Civ. Proc. § 1750; *DiLorenzo v. DiLorenzo*, *supra*.) Authority to annul other contracts extends to fraud with respect to the representation by one of the parties as to his intent concerning future action, and where a party is induced to make a contract relying upon a fraudulent representation made by the other party with respect to his intention concerning future action, but for which consent to the execution of the contract would not have been given, that is deemed a fraudulent representation with respect to a material existing fact sufficient to warrant the annulment of a contract for fraud. (*Adams v. Gillig*, 199 N. Y. 314; *Ritzwoller v. Lurie*, 225 id. 464.) Here, the marriage has not been consummated and I see no reason why it should not be annulled, and if that relief be not afforded, plaintiff will be obliged to waive her

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religious scruples and consummate the marriage without the promised religious ceremonial marriage or remain bound to the defendant and deprived of the free right she had to marry according to her religion or to remain single. Where the marriage has not been consummated, it has been held that it "is so inchoate and incomplete that the *status* of the parties is similar to that of parties to an executory contract, and may be annulled without violating any considerations of public policy." (*DiLorenzo v. DiLorenzo*, *supra*, 71 App. Div. 509, 519, cited with approval in *Svenson v. Svenson*, *supra*.) It follows that the judgment should be reversed and an interlocutory judgment of annulment entered in accordance with section 1774 of the Code of Civil Procedure.

SMITH, PAGE and MERRELL, JJ., concur; CLARKE, P. J., dissents.

Judgment reversed, with costs, and interlocutory judgment of annulment of marriage ordered.

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JAMES J. LOGAN, Respondent, v. JOHN C. TURNER, Appellant.

First Department, July 1, 1921.

**Bills and notes — action by accommodation maker to recover from comaker on theory of contract of indemnity — contract of indemnity not shown as matter of law — trial by consent of counterclaim for conversion where no objection to validity is made.**

In an action to recover the amount paid on a promissory note made by the plaintiff and the defendant as joint accommodation makers and predicated on an alleged agreement by the defendant to indemnify the plaintiff against liability thereon, evidence examined, and *held*, that it was error for the court to direct a verdict in favor of the plaintiff on the ground that as a matter of law the defendant had agreed to indemnify the plaintiff. The question of a contract of indemnity should have been left to the jury.

The counterclaim for conversion of collateral interposed by the defendant, though it did not arise out of the same transaction set forth in the complaint and was not connected with the subject-matter of the action, must on the theory of waiver of the test be deemed to have been litigated by consent, since the plaintiff raised no objection; the verdict of the jury thereon was not against the weight of the evidence.

APPEAL by the defendant, John C. Turner, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of March, 1919, on the verdict of a jury, and also from an order entered in said clerk's office on the 18th day of March, 1919, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*Nathan D. Stern*, for the appellant.

*Edmund F. Harding* [*Cyril F. dos Passos* with him on the briefs; *dos Passos Brothers*, attorneys], for the respondent.

LAUGHLIN, J.:

Plaintiff's cause of action is for the recovery of the amount paid by him on a promissory note made by him and the defendant as joint makers, and is predicated on an alleged agreement by the defendant to indemnify him against liability thereon. Defendant's counterclaim was for the alleged conversion by the plaintiff of certain bonds claimed to have been owned by the defendant.

It is alleged in the complaint that on the 16th of September, 1915, the Atlantic Beach Corporation, a Florida corporation, made and delivered its promissory note to the Barnett National Bank at Jacksonville, Fla., for \$12,500 payable three months after date, and that the plaintiff and defendant signed the note as comakers for the accommodation of the Atlantic Beach Corporation, and the plaintiff received no consideration therefor; that the defendant, at the time the note was so made for a valuable consideration, promised to indemnify and hold plaintiff harmless from and on account of the note or any renewal or renewals thereof, and agreed to pay the note or any renewal thereof at maturity; that on the 7th of September, 1916, the Atlantic Beach Corporation neglected and refused to pay a second renewal of the note, and that the plaintiff was compelled to and did pay the amount of the note with interest to the bank and is now the holder and owner thereof, and that no part of the amount so paid by plaintiff has been repaid to him by the defendant except \$5,025, which left the sum of \$7,566.62 due and owing to

plaintiff, for which he demanded judgment. The answer admitted that the defendant signed the note for the accommodation of the Atlantic Beach Corporation, and denied the other material allegations of the complaint, and alleged that prior to the making of the note, plaintiff for a valuable consideration agreed to indemnify and hold the defendant harmless from and on account thereof and that plaintiff would pay the note or any renewal thereof at maturity, and denies that the plaintiff signed the note as comaker for the accommodation of the Atlantic Beach Corporation, and alleges that on or about the 23d of July, 1915, plaintiff made an agreement with the Atlantic Beach Corporation by which he agreed to obtain for it new loans amounting to \$30,000, and that the note in question was given for one of such loans and that defendant signed it as comaker for the reason that the bank would not make the loan without his signature. It is further alleged that defendant received no part of the money advanced by the bank, and that plaintiff received a large part and applied a portion of it to the payment of debts of the Atlantic Beach Corporation, in which he was interested. It is alleged in the counterclaim that on the 18th of November, 1915, defendant was the owner of fifteen described bonds of \$1,000 each and loaned them to the plaintiff for the sole purpose of enabling him to use them as collateral in negotiating a loan for the Atlantic Beach Corporation, and that plaintiff received the bonds and agreed to use them for no other purpose, and that he did not use them for the purpose for which they were loaned, and that on the 18th of January, 1916, and subsequent thereto, defendant demanded of the plaintiff the return of the bonds but plaintiff refused to deliver them to the defendant and has converted them to his own use, to the defendant's damage in the sum of \$15,000; that on the 5th of June, 1916, defendant sold said bonds to one Bull, who thereafter repeatedly demanded them of the plaintiff and that plaintiff refused the demand, and on the 27th of September, 1916, Bull resold them to the defendant and assigned to the defendant all his claims against any person on account of the bonds, and that the value of the bonds was \$15,000; and judgment for that amount and for the dismissal of the complaint was demanded. Plaintiff replied denying the allegations of the counterclaim.

The evidence shows that the note, the renewal of which plaintiff took up by paying the bank as alleged, was made by the plaintiff and defendant on an exchange of letters between them. The first of these letters was from the plaintiff to the defendant. It was dated September 16, 1915 and, so far as here material, was as follows: "Enclosed I hand you copy of letter from Barnett National Bank, which is self explanatory. I do not know of any good reason why I should sign the note, or why they have asked it but they have asked it, and we will have to have this amount of money either from them or someone else, and unless you can arrange the \$50,000 or \$60,000 loan there which you wrote me about, I see nothing to do but to comply with their requirements and get this money. I do not think either of us takes much chance of liability in signing this note with Bonds as collateral, but in case the Company should not pay it, I would expect you to take the bonds and relieve me of the liability." Plaintiff stated in the letter that he thought the reason the bank was so exacting was that the account had been offered to it before and had been refused by it after investigation, and that the bank doubtless knew that the company was not keeping satisfactory balances, and that he inclosed a blank form of the note required by the bank, and further stated as follows: "If you wish to comply with their terms and accept this money, you can fill out the note at 90 days for \$12,500, sign it, leaving a place for the signature of the Corporation and my signature, and mail it to me at Tate Springs, Tenn." The letter from the bank which plaintiff inclosed with the note states that the discounting committee of the bank had considered the subject of the conversation between the plaintiff and president of the bank, and that the bank would accept the note of the company signed by the plaintiff and the defendant as comakers for \$12,500, due ninety days, with privilege of one renewal, secured by bonds of the company for \$25,000. Defendant replied on the 25th of September, 1915, saying: "Under the circumstances, I believe the only thing to do is to sign the note with you and I am sending same herewith to you." By the original note and the renewals the makers became jointly and severally liable. It will be observed that the defendant's reply letter contained no specific reference to the

part of plaintiff's letter in which he stated that in case the company failed to pay the note he would expect the defendant to take it up and relieve him of all liability. On the 30th of December, 1915, plaintiff sent to the defendant the first renewal note and asked him to sign it, which he did, and on the 3d of April, 1916, plaintiff sent the second renewal note to the defendant with a like request, which was complied with. None of these letters contained a reference to any agreement of indemnity. Plaintiff, on paying the second renewal note, received it and the collateral with an assignment thereof from the bank. It appears that he sold the collateral, being the bonds for \$25,000, on the 18th of August, 1917, pursuant to the law of Florida, and that they were purchased by said Bull and the plaintiff realized on the sale \$5,025, and that he has not been repaid the balance of the note.

Appellant contends that if, by the exchange of the letters, defendant became obligated to indemnify plaintiff, such obligation was confined to the original note. Literally construed, it was so limited and there was no express renewal of the obligation with respect to either of the renewal notes. It would seem, however, that when a renewal of the note was effected, plaintiff could have insisted upon a like agreement for indemnity, if this be one, and if it had not been made, could have stood upon his rights under the original letters. I deem it unnecessary, however, to decide this point, for I think the court erred as matter of law that the minds of the parties met with respect to an agreement of indemnity concerning the original note. Plaintiff merely stated that he would expect the defendant to take the bonds and relieve him from liability in the event that the company should not pay the note, but he did not make that a condition of his becoming a maker of the note; and it is to be observed that, after stating this exception on his part, he stated that if the defendant wished to comply with the terms exacted by the bank, he should fill out, sign and return the note. If he had intended to obligate the defendant to indemnify him, I think he would have there referred to the defendant's becoming so obligated to him, and that the defendant might well infer that the plaintiff entertained the expectation that defendant



would, in the event of default by the company, take the bonds and relieve him of liability by appropriating them to reimburse himself, for at that time plaintiff deemed the security ample, or would relieve him of liability on account of some moral obligation rather than a legal obligation intended to be imposed by merely signing and returning the note. The parties were friends and were both interested in the company and in at least one other enterprise. Plaintiff took up the note and took over the collateral without calling upon defendant so to do. If it may not be so held as matter of law, then I think this was a question for the jury and that the court erred in directing a verdict in favor of the plaintiff.

No objection appears to have been made that the counterclaim for conversion of bonds, which did not arise out of the transaction set forth in the complaint and was not connected with the subject-matter of the action, was not authorized, and it must, therefore, on the theory of waiver of the test, be deemed to have been litigated herein by consent, as if a breach of contract for the return of the bonds only had been alleged. An issue of fact was presented with respect to the alleged conversion of the bonds. There was testimony and evidence tending to show that the bonds were delivered, not to the plaintiff individually, but to a bank of which he was president with instructions that they be delivered to plaintiff or one Mucklow to be used in negotiating a loan or loans to the extent of \$25,000 to the Atlantic Beach Corporation, and the bank, by its cashier, receipted therefor. The fifteen bonds to which the counterclaim relates were not used in negotiating a loan for the Atlantic Beach Corporation, and according to the testimony of the plaintiff they did not come into his individual possession and were not used by him in any manner. On the part of the defendant, testimony was given tending to show that the plaintiff admitted having the bonds in his possession and refused a demand for the return thereof, claiming, in effect, that they had been pledged as authorized and that he had purchased them from said Bull. The testimony and evidence presented a fair question of fact on the issue with respect to whether or not the plaintiff converted the bonds, and were it not for what I deem error in the direction of the verdict in favor of the plaintiff on his cause of action,

no ground would be afforded for disturbing the verdict on this issue. I am of opinion, for the reasons already assigned, that the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

DOWLING, SMITH, MERRELL and GREENBAUM, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

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GREEN RIVER DISTILLING COMPANY, Appellant, v.  
MASSACHUSETTS BONDING AND INSURANCE COMPANY,  
Respondent.

First Department, July 1, 1921.

**Insurance — liability insurance — action by insured to recover from insurer cost of having attachment discharged — insurer liable on policy limiting liability but obligating it to pay all costs and expenses incident to settlement of claims — liberal construction of policy — cost of discharging attachment cannot be apportioned between parties.**

Where the liability of the insurer in an automobile insurance policy was limited, but it undertook to pay all costs and expenses incident to the investigation, adjustment and settlement of claims and to defend against all authorized proceedings, a fair and reasonable construction of the policy imposed upon the company the duty of defending the insured, a foreign corporation, against a warrant of attachment and it having failed to perform that duty, the insured is entitled to recover the amount which it paid to procure a bond to have the attachment discharged and the poundage fees paid to the sheriff.

The insurer prepared the policy and was at liberty to limit its liability in any manner, and the policy should, therefore, be construed liberally to afford the insured the indemnity which it was warranted in believing that it was obtaining thereby.

Though the demand in the negligence action against the plaintiff herein was for an amount in excess of the amount of the policy, the cost of discharging the attachment should not be apportioned between the parties in proportion to their respective liabilities, for the policy did not contemplate any apportionment of necessary costs and expenses.

APPEAL by the plaintiff, Green River Distilling Company, from a determination and order of the Appellate Term of the

Supreme Court, First Department, entered in the office of the clerk of the county of New York on the 21st day of December, 1920; reversing a judgment of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, in favor of the plaintiff.

*J. G. Milburn, Jr.* [*Rush Taggart, Jr.*, with him on the brief; *Carter, Ledyard & Milburn*, attorneys], for the appellant.

*Edgar J. Treacy*, for the respondent.

LAUGHLIN, J.:

Plaintiff and defendant are both foreign corporations duly authorized to do business here and each had an office in the city of New York for the transaction of its business. On the 21st of March, 1919, defendant issued an automobile liability policy on an automobile truck owned by the plaintiff which it used in its business. On the 27th of June, 1919, the truck, while in use by the plaintiff, struck and fatally injured one Eggert, in the borough of Brooklyn. Eggert's administrator brought an action in the Supreme Court in Kings county against the plaintiff to recover \$25,000 for negligently causing the death of Eggert. Plaintiff duly notified defendant and transmitted to it the summons and complaint as required by the policy and, as provided in the policy, defendant undertook the defense of the action. Thereafter and on the 21st of October, 1919, plaintiff in that action procured a warrant of attachment against the defendant therein on the ground that it was a foreign corporation and thereunder attached its funds in excess of \$25,000. Plaintiff herein duly notified defendant of the service of the attachment and transmitted to it the attachment papers and demanded that it take the necessary steps to have the attachment vacated or discharged. This defendant refused to do and plaintiff employed counsel and moved to have the attachment vacated or reduced. The motion to vacate was denied but the attachment was reduced to \$12,500 and was then discharged and the property released on a surety bond procured by the plaintiff at an expense of \$250 for the premium and the payment of \$300 to the sheriff

as poundage fees. Plaintiff demanded that the defendant reimburse it for those items, and on its refusal brought this action in the Municipal Court to recover the amount with interest. The issues were tried before the court without a jury and the plaintiff was awarded a judgment from which the defendant appealed and the Appellate Term reversed the judgment and dismissed the complaint.

After the attachment was thus discharged, the action in which it was granted was settled for \$4,000 and the defendant paid \$3,000 and plaintiff \$1,000 to avoid the risk of a recovery in excess of defendant's indemnity liability, which was only for \$5,000.

By the 1st paragraph of the policy, defendant agreed to indemnify plaintiff, subject to the limits thereafter specified, against loss from liability imposed by law upon it for damages on account of bodily injuries or death accidentally suffered by any person or persons, other than employees of the plaintiff, within the United States and Canada by reason of its ownership, maintainance or use of the automobile truck within the period specified in the policy. By paragraph C of the policy, in the event of a suit brought to enforce a claim for damages on account of an accident covered by the policy, plaintiff was obligated to forward to the defendant immediately "every summons or other process as soon as the same shall have been served," and defendant was obligated at its own cost and subject to limitations contained in paragraph L to "defend or at its option settle such suit in the name and on behalf of the assured." Paragraph L, among other things, limited the defendant's liability to \$5,000 for bodily injuries to or the death of one person and further provided as follows: "In addition to the limits specified above, the Company will pay all costs and expenses incident to the investigation, adjustment and settlement of claims, and all costs taxed against the Assured in any legal proceedings defended by the Company, and all interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the Company's liability as herein expressed resulting from claims upon the Assured on account of bodily injuries and or death, as aforesaid; but the Assured shall not voluntarily assume any liability, nor shall the Assured without the written consent

of the Company previously given, incur any expense, or settle any claim, except at his own cost, or interfere in any negotiation for settlement, or in any legal proceeding; except that the Assured may provide, at the Company's expense, at the time of the Accident, such immediate surgical relief as is imperative." It will be observed that although the liability of the defendant for damages was limited, it undertook to pay *all* costs and expenses incident to the investigation, adjustment and settlement of claims. Defendant contends that the attachment resulted from the plaintiff being a foreign corporation and not from the nature of the action and that, therefore, it was not liable for the expenses incurred by the plaintiff in defending the attachment. Defendant, however, knew that the plaintiff could not be incorporated in all of the States and is chargeable with knowledge when it issued the policy that in such an action in this State, an attachment might be issued. That it undertook to defend against all authorized proceedings in such an action is evidenced by the fact that it required the plaintiff to forward to it every summons or other process as soon as served. Defendant prepared the policy and was at liberty to limit its liability in any manner. The policy should, therefore, be construed liberally to afford the assured the indemnity which it was warranted in believing that it was obtaining thereby. (*Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; *Wadsworth v. Jewelers & Tradesmen's Co.*, 132 *Id.* 540; *Brewster v. Empire State Surety Co.*, 145 App. Div. 678; *Brassil v. Maryland Casualty Co.*, 210 N. Y. 235.) I am of opinion that the fair and reasonable construction of the policy imposed upon the defendant the duty of defending plaintiff against the attachment, and it having failed to perform that duty, plaintiff is entitled to recover the reasonable and necessary expenses to which it was subjected in conducting the defense itself. (*Cassidy v. Taylor Brewing & Malting Co.*, 79 App. Div. 242; *Holdgate v. Clark*, 10 Wend. 215.) It is further contended in behalf of the respondent that in any event such expenses should be apportioned between the parties in proportion to their respective liabilities for the amount claimed on the attachment, but manifestly, for the reasons already stated, that claim is untenable, for the policy did not contemplate any apportionment of neces-

sary costs or expenses. It follows that the determination of the Appellate Term should be reversed, with costs, and the judgment of the Municipal Court affirmed, with costs.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Determination reversed and judgment of Municipal Court affirmed, with costs to plaintiff, appellant, in this court and in the Appellate Term.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. RANGELEY CONSTRUCTION COMPANY, INC., Respondent, v. CHARLES L. CRAIG, as Comptroller of the City of New York, and DAVID E. KEMLO, as Chief Auditor of the Finance Department of the City of New York, Appellants.

First Department, July 1, 1921.

**Municipal corporations — city of New York — mandamus to compel payment of amount due under contract for constructing building for College of City of New York — mayor necessary party defendant — writ will not issue to compel comptroller to pay vouchers where contract not made in manner prescribed by statute.**

The mayor of the city of New York is a necessary party defendant in mandamus proceedings to compel the audit and payment of vouchers representing the amount alleged to be due relator under a contract with the trustees of the College of the City of New York for services and materials furnished in constructing a building for said college, since section 149 of the Greater New York charter requires warrants to be countersigned by the mayor.

The writ of mandamus was properly denied since the contract was not let to the relator in compliance with chapter 168 of the Laws of 1895, Education Law, section 875, and section 419 of the Greater New York charter which requires the advertising for bids, and section 149 of said charter requiring the comptroller to indorse on the contract his certificate to the effect that there remains unexpended and unapplied a balance of the appropriation or fund applicable to the payment of the contract in question, sufficient to pay the estimated expense of executing the contract, and of section 1541 of the Greater New York charter requiring an appropriation prior to the incurring of the expense by any of the departments, boards or officers of the city.

The relator was not entitled to payment by virtue of section 1132 of the Greater New York charter in reference to the expenditure of money received by the College of the City of New York in conducting special

courses of study in vocational subjects, for under that section the money so received must be expended in defraying the expense incident to gratuitous instruction in said courses.

Section 1131 of said charter granting authority to the trustees of said college to receive and administer gifts of money and buildings did not authorize the trustees to bind the city by a contract involving expenditure or liability.

APPEAL by the defendants, Charles L. Craig and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of March, 1921, granting relator's application for a writ of peremptory mandamus.

*Willard S. Allen* of counsel [*John F. O'Brien, Arthur J. W. Hilly and James P. O'Connor* with him on the brief; *John P. O'Brien, Corporation Counsel*], for the appellants.

*Herbert A. Wolff* of counsel [*Edward S. Greenbaum* with him on the brief; *Greenbaum, Wolff & Ernst*, attorneys], for the respondent.

*Moses J. Stroock* [*George L. Cohen* of counsel], for the Board of Trustees of College of the City of New York, as *amicus curiæ*.

DOWLING, J.:

On November 13, 1918, the Rangeley Construction Company, Inc., the relator, and the College of the City of New York entered into a written agreement for the construction of a three-story temporary barracks. This contract provided that the relator was to receive the actual net cost of the work, plus seven per cent of said cost, which total would not exceed the sum of \$87,472.50. Relator commenced work thereunder. This work was undertaken by the City College during the World War, at the request of the War Department of the United States in order to have a temporary barracks to house the Student Army Training Corps which the City College was operating at the request of the War Department. The construction was financed through an advance of \$50,000 made by the trustees of the City College in their individual capacity as patriotic citizens, because no funds of the city of New York were available for said construction. Subsequently the Federal government from time to time paid to the trustees for the

said construction on the presentation of vouchers which were duly audited by the War Department, showing actual disbursements therefor. When the armistice bringing to a close the World War was signed, the War Department ordered the construction to cease, and at the request of the City College, relator ceased work on the contract, and was paid in full for services and materials supplied up to that time. On January 5, 1920, relator and the City College entered into a second written agreement, which among other things called for the roofing over of the first-story walls and using the footings and materials salvaged under the former contract, which construction when finished would make a permanent one-story building harmonizing with the other buildings of the City College. In this second agreement it was recited that the trustees of City College acted within the provisions of section 1132 of the Greater New York charter which provides for the administration by the trustees of said college of a special fund comprising student fees collected by the City College in furnishing and conducting special courses and courses of study in vocational subjects and civic administration, non-matriculated student privileges and other special educational advantages. This new building as is stated in said contract was to be known as a "vocational building." The prior contract was referred to and the work was undertaken on the same basis, viz., relator was to receive the actual net cost of the work, plus seven per cent of said cost, which total was not to exceed the sum of \$32,100.

Thereafter the relator commenced the performance of the work under the terms of the contract of January 5, 1920, and has fully complied with all the terms and conditions thereof on its part to be performed and continued to furnish materials and performed work under said contract until on or about September 1, 1920.

On May 8, 1920, the relator, pursuant to the terms and conditions of the contract of January 5, 1920, submitted to the College of the City of New York a voucher in the sum of \$1,249.85, and on June 15, 1920, submitted a voucher in the sum of \$7,529.86, and on August 27, 1920, submitted a voucher in the sum of \$5,160.08, all of which vouchers were approved and certified for payment by the College of the



City of New York, and which vouchers were submitted by the College of the City of New York to the chief auditor of the finance department of the city of New York for audit and to the comptroller of the city of New York for payment, out of the special fund pursuant to section 1132 of the Greater New York charter designated as Code S-762. Audit and payment of said vouchers has been refused. The relator has not been paid anything for the work done, materials delivered at and incorporated in the building and labor performed under the terms of the agreement of January 2, 1920, although it has actually disbursed about \$15,000 for labor and materials and in all respects has complied with the terms and conditions of the two contracts and has submitted properly approved vouchers and certificates for such payments.

After audit and payment was refused by the appellants, this proceeding was brought for an order directing that a peremptory (or else an alternative) writ of mandamus issue requiring the appellants to audit and pay the aforesaid vouchers. This order was granted and from it the present appeal is taken.

At the outset objection is made that the mayor of the city of New York is a necessary party defendant. This objection is well taken, for as was said by Mr. Justice THOMAS in *People ex rel. McClinchie v. Prendergast* (140 App. Div. 237): "Section 149 of the Greater New York charter (as amd. by Laws of 1901, chap. 466, and Laws of 1904, chap. 247; since amd. Laws of 1910, chap. 545) requires that 'All payments by or on behalf of the corporation, except as otherwise specially provided, shall be made through the proper disbursing officer of the department of finance, on vouchers to be filed in said department, by means of warrants drawn on the chamberlain by the comptroller, and countersigned by the mayor.' The petitioner is entitled to the money, but as the mayor has not been made a party, the order must be modified so as to deny the writ for the payment of the money, \* \* \*." But even if the mayor had been made a party defendant herein, the relator would not have been entitled to the mandamus sought.

Chapter 168 of the Laws of 1895 provides as follows:

"Section 1. The board of trustees of the College of the City of New York is hereby authorized and empowered to select and acquire, in the name, and on behalf of the mayor,

aldermen and commonalty of the city of New York, a site for a new building or buildings for the uses and purposes of said college. Such site shall be within the boundaries of the city of New York."

"§ 6. \* \* \* The said board of trustees is hereby also authorized from time to time thereafter, to build and construct upon said site such other building or buildings for the uses and purposes of said college as said board of trustees shall deem necessary or requisite and as shall be approved by the said board of estimate and apportionment. Such buildings shall be built and constructed upon plans and specifications therefor to be adopted and approved by said board of trustees. And the said building shall be built by contract entered into by said board of trustees after advertisement for proposals therefor. All the provisions of law and ordinance and of the rules and regulations of the board of education of the city of New York relative to advertising for and receiving proposals and entering into contracts for the building of public schools in the city of New York shall be and are hereby made applicable to the awarding of and entering into the contract or contracts for the building and construction of said buildings and each of them. And the cost of such buildings and of each of them shall be provided for and shall be paid for out of the proceeds of bonds of the city of New York, which shall be issued and sold in the manner hereinbefore prescribed for the issuing and sale of bonds to pay for the said site."

Under this statute, the provisions of chapter 786 of the Laws of 1917 (adding to Education Law § 875, subd. 8) and of section 419 of the Greater New York charter, applicable to the board of education, in relation to the construction of buildings, are also applicable to the College of the City of New York.

Subdivision 8 of section 875 of the Education Law, as added by chapter 786 of the Laws of 1917, provides as follows: "No contract for the purchase of supplies, furniture, equipment, or for the construction or the alteration or remodelling of any building shall be entered into by a board of education involving an expenditure or liability of more than one thousand dollars unless said board shall have duly

advertised for estimates for the same and the contract in each case shall be awarded to the lowest responsible bidder furnishing the security as required by such board."

The material portion of section 419 of the Greater New York charter (Laws of 1901, chap. 466, as amd. by Laws of 1910, chap. 554) provides as follows:

"§ 419. \* \* \* Whenever any work is necessary to be done to complete or perfect a particular job, or any supply is needful for any particular purpose, which work and job is to be undertaken or supply furnished for the city of New York, and the several parts of the said work or supplies shall, together, involve the expenditure of more than one thousand dollars, the same shall be by contract, \* \* \* and shall \* \* \* be founded on sealed bids or proposals, made in compliance with public notices, duly advertised in the City Record, and the corporation newspapers, and said notice to be published at least ten days; \* \* \*."

In other words, all contracts involving an expenditure of more than \$1,000 can only legally be entered into after public notice and letting.

Section 149 of the Greater New York charter (as amd. by Laws of 1917, chap. 401) also provides, in part, as follows:

"§ 149. \* \* \* No contract hereafter made, the expense of the execution of which is not by law or ordinance, in whole or in part, to be paid by assessments upon the property benefited, shall be binding or of any force, unless the comptroller shall indorse thereon his certificate that there remains unexpended and unapplied, as herein provided, a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract, as certified by the officer making the same, \* \* \*."

Section 1541 of the Greater New York charter (as amd. by Laws of 1910, chap. 543) also provides, in part, as follows:

"§ 1541. \* \* \* No expense shall be incurred by any of the departments, boards or officers thereof, unless an appropriation shall have been previously made covering such expense, nor any expense in excess of the sum appropriated in accordance with law."

The importance of a rigid enforcement of these provisions for the protection of the city's interests was pointed out by

the present presiding justice of this court in *Williams v. City of New York* (118 App. Div. 756; *affd.*, 192 N. Y. 541) and *Clarke Co. v. Board of Education* (156 App. Div. 842; *affd.*, 215 N. Y. 646).

Concededly the relator has not brought itself within any of the provisions of law heretofore quoted. But it contends that it is entitled to payment of its vouchers under section 1132 of the Greater New York charter (as *amd.* by Laws of 1916, chap. 580) which provides as follows: "The trustees may also, upon such terms and conditions as to admission and attendance as they may prescribe, furnish gratuitously or otherwise, for male and female students actual residents or employees of said city, special courses and courses of study in vocational subjects and civic administration, and other educational advantages, including the admission of nonmatriculated students, within the college buildings or elsewhere; and may grant appropriate certificates and vocational diplomas and degrees to such students as shall have completed the courses or studies so prescribed. All sums of money, if any, received by said college, as provided by this section, shall be accounted for and paid into the city treasury, and shall at once be appropriated by the board of estimate and apportionment to a special fund to be administered by the trustees of the College of the City of New York in furnishing and conducting the said special courses and courses of study in vocational subjects and civic administration, nonmatriculated student privileges and other special education advantages."

It seems clear that this section refers only to the subject-matter at its head, *viz.*, "Instruction to be furnished gratuitously and otherwise by College of the City of New York; degrees and diplomas," and has no application to the construction of buildings. It deals with furnishing and conducting special courses of study, wherein the fees received from those who pay for tuition shall be used to defray the cost of the tuition of those who receive gratuitous instruction. It would be an unreasonable and unwarranted construction of the plain language of this section to hold that it placed in the hands of the trustees of the college a power to enter into contracts for building operations without the usual safeguards imposed by the charter itself. Nor does certain language of

section 1131 of the Greater New York charter (as amd. by Laws of 1918, chap. 583) confer any further right upon the trustees to bind the city to contracts not entered into pursuant to the provisions of the charter. Section 1131, so far as material, reads: "The board of trustees shall follow the procedure prescribed for the board of education in chapter seven hundred and eighty-six of the laws of nineteen hundred and seventeen in the purchase and sale of real property, though nothing in this title shall be construed as a bar to the independent acceptance and administration for the college of gifts of land, money and buildings from private sources by the trustees, or officers of the college." This confers upon the trustees the right only to accept and administer gifts of land, money and buildings from private sources and not to bind the city by contracts involving expenditure or liability.

The order appealed from will, therefore, be reversed, with ten dollars costs and disbursements, and the motion denied, with fifty dollars costs.

CLARKE, P. J., LAUGHLIN and MERRELL, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion denied, with fifty dollars costs.

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ARTHUR CARTER HUME, as Trustee for GENEVRA W. WOODRUFF, under an Assignment in Trust, Dated June 15, 1920, Appellant, v. GENEVRA W. H. WOODRUFF (Formerly GENEVRA W. HOGAN), Respondent, Impleaded with TITLE GUARANTEE AND TRUST COMPANY and Others, Defendants.

First Department, July 1, 1921.

**Mortgages — foreclosure — separate defense in effect counterclaim to which reply properly served — duty to serve reply — matters set up by reply not superfluous, irrelevant or scandalous as to issue raised by counterclaim.**

In mortgage foreclosure proceedings a separate defense set forth that the bond and mortgage had been assigned to secure a corporate debt, but by reason of the renewals of notes without notice to the assignor had been reassigned under an order of the Federal court in an action for such purpose, whereupon defendant claimed to be entitled to contribution

from plaintiff's assignor and from plaintiff, the assignee, to the extent of the bond and mortgage. *Held*, that such separate defense, while pleaded specifically as such, is in effect and substance a counterclaim under section 501 of the Code of Civil Procedure, and that, therefore, plaintiff was justified in serving a reply thereto under section 514 of said Code. It was not only the right of the plaintiff to serve his reply, but it was his duty so to do, and the respondent could have compelled the service of a reply if appellant had not served it.

In such case the objection that the reply contains matter which should be stricken out as superfluous, irrelevant or scandalous is not tenable, since the facts set forth are relevant and material upon the issue tendered by the counterclaim.

APPEAL by the plaintiff, Arthur Carter Hume, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of April, 1921, granting defendant's motion to strike from the files the reply and the amended reply of the plaintiff to the answer.

*Arthur Carter Hume*, for the appellant.

*John Kirkland Clark* of counsel [*Clark, Prentice & Roulstone*, attorneys], for the respondent.

DOWLING, J.:

This action was brought to foreclose a mortgage given to secure the payment of the sum of \$18,000 with interest covering certain premises located in the borough of Manhattan, city of New York. The answer of the respondent herein, after certain denials of allegations of the complaint, sets up three separate defenses which, briefly stated, are as follows:

*First.* That Geneva W. Woodruff, plaintiff's assignor, who is alleged to be the real party in interest, had violated an injunction issued in a certain proceeding in the Superior Court of Middlesex county, State of Connecticut, wherein the respondent was plaintiff and plaintiff's assignor was defendant, whereby said assignor was enjoined, pending the determination of the said action, from assigning or in any way disposing of the bond and mortgage in suit herein, and that the assignment made by Geneva W. Woodruff to the plaintiff was made in defiance of the order of said court and that the plaintiff herein and his assignor have violated said injunction and do not come into this court with clean hands and the proceeding brought herein is, therefore, without equity.

*Second.* That there was an agreement made at the time the mortgage in question was executed and delivered whereby plaintiff's assignor agreed with respondent that so long as said assignor resided with respondent in the premises in question no interest should accrue upon said bond or upon the indebtedness secured by said mortgage but that the continued residence of the said assignor on said property should be regarded as payment in full on account of said interest; wherefore no interest accrued upon said bond or upon the indebtedness secured by the mortgage but that the same had been fully paid and discharged.

*Third.* That prior to the commencement of this action Geneva W. Woodruff, plaintiff's assignor, was financially interested in a certain corporation in which respondent was also interested but in which she was neither an officer nor director; that said corporation needed capital in connection with its business and had, prior to February 4, 1916, obtained large sums of money on notes made by it and delivered to certain national banks in Vermont which are also parties defendant in this action; that certain of the loans evidenced by such notes had become due and payable and the corporation was unable to meet same and, therefore, it was necessary to enable it to continue its business to procure the renewal of said loans; that in order to secure the renewal of these loans the corporation was notified that it would be required to deposit with a trustee, or with the banks, certain additional property as collateral security. Whereupon, the son of Geneva W. Woodruff, plaintiff's assignor, requested her to come to the assistance of the corporation by loaning certain property belonging to her which should be deposited as additional collateral for the loans to the corporation; that on or about February 4, 1916, said assignor, in order to protect her interest in the corporation and to secure the extension of its loans, transferred to one Charles G. Staples, as cashier, all her right, title and interest in and to the bond and mortgage described in the complaint herein and on which this action is brought. The respondent herein, pursuant to a request from the corporation, also deposited as collateral for its loans certain stocks, bonds and other securities belonging to her which were pledged with the Vermont National Bank

as collateral security for the renewal loans, and said respondent also indorsed and guaranteed such renewal notes, her action in so guaranteeing being based, among other things, upon the understanding that plaintiff's assignor had, as such additional security, deposited the said bond and mortgage for the benefit of the said banks. Thereafter the notes were from time to time renewed, the renewals purporting to be secured by the securities hereinabove described. On or about April 4, 1917, the corporation was adjudged a bankrupt and its property was insufficient to discharge its indebtedness to said banks. Thereupon the securities which defendant had deposited as collateral for the indebtedness were sold and respondent has also made payments otherwise on account of said indebtedness aggregating more than \$61,000. Thereafter plaintiff's assignor instituted a proceeding in the United States District Court for the District of Vermont against the banks and the trustee in bankruptcy and obtained a decree directing the return to her of the bond and mortgage in question upon the ground that the extension of the notes, as security for which the bond and mortgage had been deposited, had been made by the banks without the consent of plaintiff's assignor. Whereupon the bond and mortgage in pursuance to the decree were reassigned to plaintiff's assignor. It is alleged that the fact that such extension by which plaintiff's assignor obtained the discharge of the bond and mortgage from the obligation of the corporation were procured without the knowledge of the said assignor was unknown to respondent, and the action of said corporation in obtaining the renewals without the consent of plaintiff's assignor was likewise unknown to respondent. It is finally averred that as a result of the transactions hereinabove set forth plaintiff's assignor has avoided the payment of any part of the indebtedness of the said corporation and has allowed and permitted this respondent to meet and discharge all of the same without making any contribution toward such payment to respondent; that thereupon respondent became entitled, as against plaintiff's assignor, to contribution toward the payments made by respondent for the discharge of the obligation of the corporation to the extent of the total value of the bond and mortgage,



and that said assignor has paid nothing on account of the said obligation to make contribution. Whereupon respondent claims to have become entitled to contribution from plaintiff's assignor and from plaintiff herein, the alleged assignee of the bond and mortgage, to the extent of the total amount which is claimed to be due thereunder. The judgment asked is that the complaint herein be dismissed and that the bond and mortgage set forth in the complaint be declared paid, canceled and discharged.

To this answer plaintiff has served a reply and an amended reply which the respondent has moved to strike from the files upon the ground that they are superfluous, irrelevant and scandalous; or, in the alternative, to strike out certain specified paragraphs therefrom. These paragraphs sought to be eliminated have to do entirely with facts pleaded as a defense to the third separate defense hereinbefore summarized.

I am of the opinion that under section 501 of the Code of Civil Procedure this third separate defense, while pleaded specifically as a defense, is in form, effect and substance a counterclaim for it complies with all the requirements of the said section as such. This being so, the plaintiff was justified in serving a reply to the counterclaim under the provisions of section 514 of the Code of Civil Procedure. In my opinion it was not only the right of the plaintiff to serve his reply but it was his duty so to do and the respondent could have compelled the service of a reply if appellant had not served such a pleading.

Nor is the objection tenable that the reply contains matter which should be stricken out as superfluous, irrelevant or scandalous. The facts set forth are relevant and material upon the issue tendered by the counterclaim and are properly included in the amended reply.

The order appealed from will, therefore, be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, MERRELL and GREENBAUM, JJ.,  
concur.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

HARRY STELLA, Appellant, Respondent, v. BANKERS  
COMMERCIAL CORPORATION, Respondent, Appellant.

First Department, July 1, 1921.

**Sales — conditional sale — agreement to deliver motor truck together with special body — conditional sale covering said agreement without mention of special body — assignment of said contract together with notes given in payment — action by purchaser against assignee to recover amount paid after rescission of contract for failure to deliver special body — plaintiff merely general creditor without specific claim upon truck — possession of truck by assignee as security for other claims against seller — Personal Property Law, § 65, gives right of action solely against seller.**

The plaintiff after directing a motor company to enter an order for a truck to be delivered at once with a special body to be delivered "in about three weeks or so" made a conditional bill of sale in the usual form with the motor company providing for payment of the balance of the purchase price by notes payable monthly, but there was no mention made of the special body. On the same day the motor company assigned the contract of sale together with the notes to the defendant. Thereafter the plaintiff paid three of the notes, one to the motor company and two to the defendant and because of the failure of the motor company to deliver the special body tendered the truck to it and offered to rescind the contract, which offer was accepted, but the plaintiff did not demand the return of the money paid or of the unpaid notes. After the bankruptcy of the motor company the plaintiff commenced this action against the defendant to recover the amount paid under the contract.

*Held*, that the tender of the truck by plaintiff and the acceptance thereof constituted a mutual rescission of the contract as matter of law;

That the plaintiff upon the rescission of the contract without a demand for the return of the money paid or of the unpaid notes became at most a general creditor of the motor company without any right against the defendant or any specific claim upon the particular truck;

That the defendant by the assignment of the contract of sale did not become the owner of the truck although it came into its possession prior to the bankruptcy of the motor company as security for other claims;

That the defendant by thus taking the truck and disposing of it at private sale without notice to the plaintiff did not become liable for a violation of sections 65 and 67 of the Personal Property Law, since section 65 gives a right of action solely against the vendor where property has been sold in violation of its provisions.

APPEAL by the plaintiff, Harry Stella, from an order and determination of the Appellate Term of the Supreme Court,

First Judicial Department, entered in the office of the clerk of the county of New York on the 6th day of February, 1920, reversing a judgment of the Municipal Court of the City of New York, Borough of Manhattan, Third District, dismissing the complaint, in so far as the same limits the plaintiff's recovery to the sum of \$214.11 instead of awarding him the sum demanded in the complaint.

Appeal by the defendant, Bankers Commercial Corporation, from the whole of said order and determination.

*Louis W. Severy* of counsel [*Charles A. Ogren*, attorney], for the plaintiff.

*Grant C. Fox* of counsel [*Walter A. Hall*, attorney], for the defendant.

DOWLING, J.:

The facts in this case appear without dispute in a written stipulation filed in the Municipal Court. On or about November 15, 1916, the plaintiff entered into an agreement in writing with the Lincoln Motor Company, Inc., whereby he directed the latter to enter an order for one Stewart truck to be delivered at once, with a body to be delivered about "three weeks or so" thereafter. The price for the car, complete with lettering, was to be \$1,594.50, of which \$530 was paid in cash, the balance to be payable in fifteen monthly payments with six per cent interest including insurance for two years. Thereafter on November 23, 1916, a conditional bill of sale was made between the Lincoln Motor Company, Inc., therein called the "seller," and plaintiff, therein called the "purchaser," whereby the seller sold to the purchaser a Stewart truck in accordance with the order theretofore given and upon the terms set forth in said order, the balance of the purchase price being represented by fifteen notes payable monthly beginning December 27, 1916, fourteen thereof being for the sum of \$71 each and the last note maturing being for the sum of \$70.50. This conditional bill of sale was in the usual form and provided that delivery of the car by the seller to the purchaser did not pass title thereto and that the car and title thereto should remain vested in and be the property of the seller and its assigns until the notes evidencing the

installments of the purchase price had been paid in full. On the same day, November 23, 1916, the defendant, for value and before maturity, duly purchased said fifteen promissory notes which were duly indorsed by the Lincoln Motor Company, Inc., and delivered to defendant, and at the same time the motor company duly assigned to defendant the contract of sale hereinbefore referred to by an instrument in writing indorsed on the back thereof. At the time of such assignment the defendant had no knowledge of the terms of the original order for the truck given on November 15, 1916, nor did it acquire knowledge thereof until after this action had been commenced. Thereafter plaintiff paid the first three of the notes, being those maturing December 27, 1916, and January 27 and February 27, 1917, the first note being paid by check to the order of the Lincoln Motor Company, Inc., and the last two by check to the order of the Bankers Commercial Corporation. Plaintiff claims that he never received notice of the assignment of the conditional bill of sale to defendant until August, 1917, when the latter made demand upon him in writing for the payment of the notes due March twenty-seventh, April twenty-seventh, May twenty-seventh and June twenty-seventh, then all past due; but he does not deny the fact that he paid two of the first three notes directly to the defendant herein. The Lincoln Motor Company, Inc., never delivered to plaintiff the special body referred to in the agreement between it and plaintiff although numerous requests were made therefor, and so, on or about March 19, 1917, and over three months later than the date of delivery stipulated in the original agreement, plaintiff called at the place of business of the Lincoln Motor Company, Inc., with the truck, and with his attorney, and there saw the general manager of the motor company, when plaintiff's attorney said that plaintiff was dissatisfied with the truck and "now offers to return the truck and call the whole deal off and rescind the contract;" to which the manager of the motor company replied, "Put it in the garage. That is all you have to do." The manager then turned his back on the parties and plaintiff and his attorney walked out. Plaintiff told his chauffeur to drive the truck in the garage, to give the truck back again, and the truck was put in the garage of the Lincoln

Motor Company, Inc., and left there. Thereafter and on April 3, 1917, plaintiff commenced an action against the Lincoln Motor Company, Inc., in the Municipal Court of the City of New York, Borough of Manhattan, Third District, and by a verified complaint set forth among other facts that plaintiff had duly performed all the terms and conditions of the contract on his part to be performed but that the defendant Lincoln Motor Company, Inc., utterly failed, neglected and refused to deliver the special body in accordance with the terms of the contract although duly demanded. Said complaint contained further the following allegations:

*"Fifth.* That because of the failure, neglect and refusal of the defendant (Lincoln Motor Co., Inc.) to perform said contract on its part as aforesaid, the plaintiff, or on about the 19th day of March, 1917, duly offered to return said Stewart Motor Truck and rescind the contract of sale, whereupon the defendant accepted said offer, received said truck and rescinded said contract."

It was further alleged that prior to the rescission of the contract the plaintiff had duly paid on account of the purchase price the sum of \$713 with interest, and prior to the commencement of the said action plaintiff duly demanded from said Lincoln Motor Company, Inc., the repayment of the said sum which it refused to repay. The answer of the Lincoln Motor Company, Inc., in said action admitted that the special body referred to in the original agreement had not been delivered to plaintiff and admitted that plaintiff had offered to return the motor truck referred to and that he had paid the sum of \$713 with interest on account of the purchase price thereof. On July 23, 1917, the defendant removed a dozen or fifteen trucks from the garage of the Lincoln Motor Company, Inc., because of an indebtedness arising out of a variety of transactions between the parties and among the trucks so removed was the one in question. This removal took place after the rescission of the contract of sale had been effectuated, according to plaintiff's testimony and according to the sworn complaint in the Municipal Court action against the Lincoln Motor Company, Inc. This rescission, as has been said, was on the ground that the Lincoln Motor Company, Inc., had failed to furnish the special

body to which plaintiff was entitled under the contract. On the trial of the action brought by plaintiff against the Lincoln Motor Company, Inc., the complaint was dismissed, but on appeal the Appellate Term reversed the judgment and held that what occurred when plaintiff returned the truck constituted a rescission as a matter of law. (*Stella v. Lincoln Motor Co., Inc.*, 166 N. Y. Supp. 763.) Thereafter, the Lincoln Motor Company, Inc., went into bankruptcy and then plaintiff commenced his action against the present defendant to recover the amount of \$715.29 with interest, being the amount of his original payment of \$450 and of the three notes which he paid. The first cause of action was based upon the theory that by the assignment of the contract of conditional sale, the defendant became the owner of the truck and the Lincoln Motor Company, Inc., its authorized agent, and that defendant having failed to deliver the special body in accordance with the terms of the contract, and having obtained possession of the truck is liable for the repayment to plaintiff of all payments made by plaintiff thereon. The second cause of action is based upon the ground that after retaking the truck the defendant sold the same at private sale without giving him notice thereof and that, therefore, it failed to comply with sections 65 and 67 of the Personal Property Law and is liable to plaintiff for the amount paid by him on account of his contract. It appears from the agreed statement of facts that the defendant did in fact dispose of the motor truck at private sale without giving notice thereof to plaintiff.

Upon the trial of the present action the plaintiff's complaint has been dismissed and the Appellate Term by a divided court has reversed the judgment in favor of the defendant and directed judgment in favor of the plaintiff for the amount of the three promissory notes paid by him.

With respect to the second cause of action, it is sufficient to say that the right of action given by section 65 of the Personal Property Law in favor of the vendee, where property has been sold in violation of its provisions, is one existing solely against the vendor and, therefore, in no event would this defendant be liable thereunder.

But even under the first cause of action, it would seem

that plaintiff has failed to establish his right to recover thereunder. The conditional bill of sale made no reference to any agreement upon the part of the vendor, the Lincoln Motor Company, Inc., to furnish any special body. It calls simply for the delivery of one Stewart chassis number 3247, motor number 24392, model number 4. This conditional agreement of sale which was transferred to the defendant, therefore, bore upon its face no indication that it was not complete in itself or that it had not been fully performed by the vendor. It appears without dispute that the defendant had no knowledge of the existence of the terms of the prior agreement, known as an order, under which the Lincoln Motor Company, Inc., obligated itself to deliver within three weeks from November 15, 1916, a special body to the plaintiff. When the plaintiff, accompanied by his attorney, called upon the Lincoln Motor Company, Inc., to effect a rescission of the contract he knew that the defendant had become the owner of the last two of the promissory notes which he had already paid for he had made payment by check direct to it under instruction, as he swears, of the secretary of the Lincoln Motor Company, Inc. With knowledge of the fact that these notes had been transferred to the defendant, the plaintiff, through his attorney, offered to return the truck and call the whole deal off and rescind the contract, and this the Lincoln Motor Company, Inc., accepted. To effect the rescission and make it complete the plaintiff then and there caused the truck to be driven into the garage of the Lincoln Motor Company, Inc., and left there. The plaintiff did not then demand the return of his remaining twelve unpaid promissory notes, nor did he demand the return of the money which he had already paid thereon. But he treated the transaction as an effected and complete rescission of the contract and in assertion of that claim sought by his action in the Municipal Court against the Lincoln Motor Company, Inc., to recover back from it all the payments he had made on account of the truck, including the amount of the two notes which he had paid directly to the present defendant, still asserting that as between himself and the Lincoln Motor Company, Inc., the sole parties to the transaction, the contract had been completely rescinded. It was not until the Lincoln Motor Company, Inc., became

bankrupt and his cause of action against it seemed of doubtful or no value that he sought to assert any claim against the present defendant. I am unable to find any force in his present contention as it seems to me that whatever right the plaintiff had existed solely against the Lincoln Motor Company, Inc. His contract was with it alone. When he tendered back the truck to that company and the latter accepted its return the transaction constituted a mutual rescission as a matter of law as has been heretofore held. Plaintiff had a perfect legal right to rescind because of the failure of the vendor to live up to its contract to furnish a special body. The vendor did not dispute either the agreement or the breach thereof. Plaintiff, in any event, surrendered and abandoned the truck to the Lincoln Motor Company, Inc., and thereafter had no special lien or claim thereupon and as he did not make the return of his unpaid notes or of the amount he had already paid upon the contract a condition for the completion of the rescission he became, when the rescission was executed, at most a general creditor of the Lincoln Motor Company, Inc., without any specific claim upon this particular truck.

If the defendant had taken possession of the truck under the assignment to it of the conditional sales contract a different question might be presented, but the undisputed evidence is that defendant took possession of a number of trucks, including the one in question, solely to protect its rights and enforce its claim under a number of transactions between it and the Lincoln Motor Company, Inc., not including the transaction in question. As to whether the defendant had the legal right to take these trucks is not before us, for that is a question between the defendant and the trustee in bankruptcy of the Lincoln Motor Company, Inc., and does not concern the plaintiff.

Upon this record it affirmatively appears that the defendant in no way undertook to constitute the Lincoln Motor Company, Inc., its agent, or to expressly ratify or affirm any act which it had theretofore performed. All this defendant did was to take possession under a general claim of the right arising out of a variety of financial transactions between the parties, of the dozen or fifteen trucks which it found in the possession of the Lincoln Motor Company, Inc., and which



it treated as being the property of the Lincoln Motor Company, Inc. The truck was in fact at that time the property of the Lincoln Motor Company, Inc., under the complete and unequivocal rescission of the contract upon which plaintiff himself had insisted and which he was justified in asserting.

Under these circumstances there is no theory upon which the defendant can be held liable either for the total amount paid by plaintiff on account of the purchase price of the truck or even for the amount of the two notes which plaintiff paid directly to the defendant.

The determination of the Appellate Term will, therefore, be reversed, with costs, and the judgment of the Municipal Court affirmed, with costs.

CLARKE, P. J., LAUGHLIN, MERRELL and GREENBAUM, JJ., concur.

Determination and judgment reversed and judgment of Municipal Court of February 4, 1919, affirmed, with costs to defendant in this court and in the Appellate Term.

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GEORGE COLON & COMPANY, Appellant, v. LOUISE HASSEN-  
PFLUG, as Administratrix, etc., of SARAH B. SMITH, Deceased,  
and Others, Respondents.

First Department, July 1, 1921.

**Liens — mechanic's lien — failure to file in time — expiration of time for filing lien deferred by acquiescence in owner's contention that contract was not completed.**

A lien by a contractor engaged to excavate a foundation is properly filed within ninety days after he had repaired the sidewalk and removed certain rubbish, stones and dirt from the premises, which work was done long after he considered his work completed, on the insistence of the owner that it was a part of the work called for by the contract, where it appears that such work was performed in good faith and in recognition of the owner's contention that the contract had not been completed.

CLARKE, P. J., and DOWLING, J., dissent.

APPEAL by the plaintiff, George Colon & Company, from a judgment of the Supreme Court in favor of the defendants,

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First Department, July, 1921.

entered in the office of the clerk of the county of Bronx on the 30th day of June, 1920, as amended by an order entered in said clerk's office on the 19th day of October, 1920, upon the decision of the court rendered after a trial at the Bronx Special Term dismissing the plaintiff's complaint upon the merits.

*Mortimer M. Menken* of counsel [*Menken Brothers*, attorneys], for the appellant.

*Edward W. Norris* [*Lillian Herbert Andrews* with him on the brief], for the respondent *Hassenpflug*.

*Daniel Combs*, attorney, for the respondent *Globe Indemnity Company*.

SMITH, J.:

Michael J. Fitzgerald had a contract with Sarah B. Smith, since deceased, to excavate rock and earth for the foundation for an apartment house to be erected on a triangular parcel of land at the corner of Merriam avenue and University, formerly Aqueduct, avenue. He partly completed the work and then sublet the contract to the plaintiff which completed the work. The plaintiff also had a contract with Sarah B. Smith to put in the foundation for the building. The excavation contract provided that the rock taken out should be used in the foundation, any excess to belong to the contractor, and when plaintiff took over that contract it became the owner of the rock and used what was necessary in building the foundation under the other contract. There is no question about the full performance by both parties of the foundation contract. While Fitzgerald was working on the excavation contract, he found it necessary to obtain from the city a permit to drive across the sidewalk to enable his teams to be used in the work and he asked the owner to put up the necessary \$250 security by way of a bond or cash. She put up the \$250 in cash as security that the contractor would leave the sidewalk in good condition. The excavation contract was oral and concerning its terms Sarah B. Smith said in a letter of June 5, 1913: "My contract made with Mr. Fitzgerald is as follows: That upon the completion of the excavating of rock and dirt according to the plans filed with the Building Department, he is to receive one-half of

the money due and the balance upon the completion of the building. He was to leave the sidewalk in as good condition as he found it and I deposited \$250 for him as a bond with the city authorities. He was to take away all trees and dirt and was to leave a two foot passageway in the rear of the lots on Merriam Avenue level with the street. He has received from me \$2,150, the sum of \$1,900 by check and the sum of \$250 cash as a bond. He therefore has received nearly \$6 more than what is due him on the completion of the entire excavation, and no further amount is due until the building is completed. I wrote to Mr. Fitzgerald several days ago telling him of your claim for the payments due for the work and asked him how it was that you were asking me for the money when he was supposed to be the contractor, but he has made no reply to my letter.

"I do not think it advisable to cart any more rock away until foundation walls are completed, as architects looking at the work do not think sufficient rock has been left for all the walls that are to be built."

There was some extra excavation done by the plaintiff so that when that contract was completed there was unpaid on it \$3,793.40. At this time there was due from Sarah B. Smith on the original excavation contract \$3,500.30, as found by the trial judge. When the plaintiff considered that it had completed the excavation contract and made a request for payment it was met by the statement from Sarah B. Smith that there was dirt and rock on the premises which must be carted away and that the sidewalk had not been repaired or replaced to the satisfaction of the inspector of the city and that this must be done by the contractor. There is some evidence that the original contractor, Fitzgerald, did some work on the sidewalk in November, and there is also evidence undisputed that the plaintiff did work January 5, 6 and 7, 1914, in repairing the sidewalk and in breaking up large rocks and removing rock and rubbish from the premises. While the plaintiff claimed that it had fully completed the work on the excavation contract, it acquiesced in the claim of Sarah B. Smith that the contract was not fully performed and did the work January 5, 6 and 7, 1914, to comply with the interpretation of Sarah B. Smith.

On April 4, 1914, not having been paid by Sarah B. Smith for the excavation work, the plaintiff filed the lien concerning which the trial court has found that it was not filed within ninety days after the completion of the contract. The question to be decided is, was the work of January 5, 6 and 7, 1914, performed in good faith under the contract. The trial judge has found that in making the excavation contract nothing was said about work to be done on the sidewalk; that a second oral contract was made between Fitzgerald and Sarah B. Smith concerning the city permit and the deposit of \$250; that the work of January 5, 6 and 7, 1914, was not performed in good faith under the contract; that the plaintiff's notice of lien was not filed within ninety days of the completion of the excavation contract, and refused to find several requests to find proposed by the plaintiff, to all of which due exceptions were taken by the plaintiff. We think that the trial judge was in error and that certain of his findings and refusals were against the weight of evidence. There was ample evidence that the excavation contract included such work as might be necessary to clean up the premises and to repair the sidewalks. While the plaintiff claimed that it was not required to do that work, Sarah B. Smith insisted that the contract did include such work and that it must be done by the plaintiff or Fitzgerald. Fitzgerald and the plaintiff acquiesced in this interpretation and did the work required in good faith under the contract.

We, therefore, reverse the findings 2d, 4th, 5th and 9th and find the facts proposed by the plaintiff in its proposed findings numbered 5th, 7th, 15th, 17th, 20th and 22d in addition to those found and allowed by the trial judge and we make the conclusions of law proposed by the plaintiff except that the amount due on the Fitzgerald contract shall be fixed at \$3,500.30 and the judgment hereinbefore entered is reversed, with costs of this appeal to the plaintiff, and judgment ordered in plaintiff's favor, with costs.

PAGE and GREENBAUM, JJ., concur; CLARKE, P. J., and DOWLING, J., dissent.

Judgment reversed, with costs, and judgment ordered in plaintiff's favor, with costs. Settle order on notice.

RICHARD WIGHTMAN, Respondent, v. G. G. HYNSON & Co.,  
Inc., Appellant.

First Department, July 1, 1921.

**Principal and agent — agreement by firm of stockbrokers to pay agent fifty per cent of net profits on sale of stock — commissions paid firm and salary paid president not chargeable against gross profits.**

A firm of stockbrokers, employed to float an issue of stock, which agreed with plaintiff to pay him fifty per cent of the net profits which accrued to him from the sale of the stock, has no right to charge against the gross profits any commission paid to the firm itself for making any sale, nor has it the right to charge anything for the salary of its president.

APPEAL by the defendant, G. G. Hynson & Co., Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 26th day of April, 1920, on the verdict of a jury, and also from an order entered in said clerk's office on the 28th day of April, 1920, denying defendant's motion for a new trial made upon the minutes.

*Harry N. Selva* of counsel [*Otto A. Gillig*, attorney], for the appellant.

*Hector M. Hitchings* of counsel [*J. Elmer Melick* with him on the brief; *Hitchings & Burdick*, attorneys], for the respondent.

SMITH, J.:

The defendant was employed by the Osage Oil and Refining Company to sell stock of said company. The defendant's president was first introduced to the representative of that company by the plaintiff, and the plaintiff did some work thereafter in going to Chicago to arrange about the advertising for the sale of the stock. The Osage Oil and Refining Company was engaged in the development of some lands in Oklahoma. The plaintiff has sworn that the defendant agreed to give to the plaintiff fifty per cent of the net profits which accrued to him from the sale of this stock. It appears that the plaintiff sold 402,115 shares of the stock for which defendant received

\$421,763.35. This amount seems to be in part contradicted by the evidence, wherein the defendant's president swears that the amount that was received for the stock, after certain returns, amounted to \$410,573.25. From this was paid to the Osage Company \$219,697.23, and this would leave, as retained by the defendant \$190,876.02. From this it is claimed by the defendant that they paid in commissions \$141,000 for salesmen, and other expenses are claimed to have been paid in the sum of \$52,056.89, and \$500, making \$413,567.09, claimed to be the expenses which are to be deducted before the ascertainment of the net profits. But this would result in a loss of \$2,993.84. These other expenses, amounting to \$52,056.89, consisted of rent, advertising, postage, printing, stationery, office salaries and general overhead expenses. All of the overhead expenses of the defendant corporation during the period from January to August of 1918 have been charged against this gross profit. It is sworn to by one of the witnesses that during this time they were doing no other business.

Of these commissions claimed to have been paid the defendant claims to have paid itself for commission the sum of \$32,210.28, and to have paid to the defendant's president the sum of \$7,000, making in all the sum of \$39,210.28. It is not disclosed, aside from these two items, what entered into the commission charge of \$141,000, or the other expenses of \$52,000. The plaintiff only claims the right to fifty per cent of the net profits.

The defendant clearly had no right to charge against the gross profits any commission paid to the firm itself for making any sale, nor did it have a right to charge anything for the salary of the defendant's president, so that upon the proof, as it appears in the record, it cannot be said that the plaintiff has proven a net profit of more than \$39,210.28, less the amount of loss as sworn to by the defendant of \$2,993.84. The largest amount, therefore, to which the plaintiff has shown himself entitled under the evidence is one-half of \$36,216.44, which amounts to \$18,108.22, and the jury was not authorized upon the evidence to render a verdict for the plaintiff in any sum in excess of that amount.

The judgment and order, therefore, must be reversed and

a new trial granted, with costs to the defendant to abide the event, unless the plaintiff will stipulate to reduce the verdict to the sum of \$18,108.22. If such stipulation be filed, the judgment may be amended to conform thereto, and as amended the judgment and order may stand affirmed, without costs.

CLARKE, P. J., LAUGHLIN, PAGE and MERRELL, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event unless plaintiff stipulates to reduce verdict to \$18,108.22, in which event the judgment as so modified and the order appealed from are affirmed, without costs. Settle order on notice.

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WILLITS & PATTERSON, Appellant, v. ABEKOBEL & Co.,  
LIMITED, Respondent.

First Department, July 1, 1921.

**Sales — c. i. f. contract modified by expression " net landed weight "**  
— action by buyer to recover portion of purchase price paid because  
of shortage at time of delivery — motion to vacate warrant of  
attachment denied.

The expression " net landed weight " in a c. i. f. contract for the sale of goods to be shipped from Japan to San Francisco modifies said contract so as to make it one for delivery by the seller at San Francisco of the full weight stipulated.

In an action by the buyer to recover the proportionate amount of the purchase price paid because of a shortage existing at the time of delivery, held, that the plaintiff has shown by his complaint and affidavit the existence of a cause of action and that, therefore, a motion to vacate a warrant of attachment obtained by the plaintiff should be denied.

APPEAL by the plaintiff, Willits & Patterson, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of November, 1920, resettling an order entered in said clerk's office on the 11th day of November, 1920, granting defendant's motion to vacate a warrant of attachment obtained by plaintiff.

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First Department, July, 1921.

*Kenneth M. Spence* of counsel [*Morton Abrahams* with him on the brief; *Travis, Spence & Hopkins*, attorneys], for the appellant.

*Clifton P. Williamson* of counsel [*Alexander & Green*, attorneys], for the respondent.

SMITH, J.:

The plaintiff is a California corporation. The defendant is a Japanese corporation. Upon the 22d of December, 1919, they entered into a contract on the part of the defendant to sell and on the part of the plaintiff to purchase some soya bean oil. This contract was in the following form:

"Kobe Sale No. 84. KOBEL, 22nd December, 1919.

"Messrs. WILLITS & PATTERSON,  
"San Francisco.

"Bought of ABE KOBEL KOBEL BRANCH,  
"Kobe, Japan.

| Date | Quantity     | Description                                | Packing                    | Shipment                  | Price                             |
|------|--------------|--|----------------------------|---------------------------|-----------------------------------|
|      | 10,000 cases | Bean Oil not<br>exceed 3% of<br>fatty acid | 75 lbs.<br>tin in<br>cases | Jan/Feb/<br>March<br>1920 | \$15.00<br>per<br>100 lbs.<br>cif |
|      |              | Nét landed weight                          |                            |                           | San Francisco.                    |

1% of Commission  
to Mr. Donkin

Comm. Paid Mar. 27

"Confirmed by your Mr. H. Donkin

"on the 22nd December 1919

"Terms:— as usual

"ABE KOBEL KOBEL BRANCH  
"P. P. M. Mori."

It will be noticed that the contract called for 10,000 cases, 75 pounds in each case, which would make 750,000 pounds of this oil. The plaintiff paid the full price for the oil. When the oil arrived in San Francisco, however, there was a shortage of 79,555 pounds. This action is brought by the plaintiff, the buyer, to recover back the proportionate amount of the purchase price paid, which amounts to \$11,483. The complaint



contained two causes of action. The first cause of action was to recover back the amount paid upon a contract for the delivery of peanut oil, upon which there was a shortage at the time of delivery of the value of \$12,864, so that the amount demanded in the complaint was the sum of \$24,167, with interest from the 17th day of August, 1920. This included the damages upon both causes of action. An attachment was granted and levied upon property of the defendant in the State of New York. Upon defendant's motion to vacate that attachment, the plaintiff made no claim that the first cause of action was proven, but sought to uphold the attachment as to the second cause of action. The Special Term held, however, that there was no cause of action shown by the papers and granted the order wholly vacating the attachment. The sole question presented for determination here is as to whether the plaintiff has shown by his complaint and affidavit the existence of the cause of action set forth in the complaint as the second cause of action which is upon the contract hereinbefore set forth. The Special Term has held that this contract was simply a c. i. f. contract and that the perils of the voyage from Japan to San Francisco were at the buyer's risk, and for failure to show that this shortage existed at the time of the delivery to the carrier, the plaintiff has failed to show any right of action.

The law is well settled that a simple c. i. f. contract requires the seller to deliver to the carrier and upon such delivery the obligation of the seller is at an end and the risk of the voyage is thereafter with the buyer. These contracts of sale, however, are to be construed according to the intention of the parties. A straight f. o. b. contract is satisfied by the seller's delivery to the carrier for the purpose of shipment, the risk of transportation resting upon the buyer. If, however, there be anything in the contract which shows that such was not the intention of the parties, the contract will be construed according to their intention. This court has lately held in the case of *Standard Casing Co., Inc., v. California Casing Co., Inc.* (197 App. Div. 187) that in a contract to ship from California to New York, reserving the right of inspection to the buyer at New York, the liability of the seller was shown by this provision to extend to a delivery in New York city, notwith-

standing the contract provided for a price f. o. b. San Francisco. This case followed a decision of this court in the case of *Boss v. Hutchinson* (182 App. Div. 88) wherein it was held, notwithstanding a named price f. o. b. at point of shipment that the right of inspection at the destination of the transportation indicated an intention that the delivery was not to be deemed complete until such destination was reached. In the case at bar we find the expression "Net landed weight." This expression can only have one significance and that significance is that the weight at the point of landing, to wit, at San Francisco, must accord with the requirements of the contract. It is true that this expression is put in a column under the word "description," and preceding in that column are the words "Bean Oil not exceed 3% of fatty acid." But the provision "Net landed weight," although appearing in that column, is a distinct expression, not connected with the description in any way. The clause begins with a capital "N," and although it is in the column marked "description," it is between the first column which provides for 10,000 cases and the third column which provides for seventy-five pounds in a case, under which circumstances it may well be held that it was not intended in any way to be a part of the description of the property sold, but was rather intended to be a part of the weight as specified in the first and third columns, although placed in the second column under the word "description" between the first and third columns. Wherever these words might be placed, however, no significance can be given to these words as a part of the description of the article sold. The description in reference to the extent of fatty acid can in no way be determined by weight. It is shown that the amount of fatty acids is determined by chemical analysis and it is not apparent how the net landed weight can in any way qualify the description.

The first cause of action, which has been abandoned, is upon a contract specifying peanut oil "delivered weight," and the contract is defined to be a c. i. f. contract. It might well be held in such a case that "delivered weight" means the weight upon delivery to the carrier. This contract sued upon contains the words "terms as usual." There had been prior contracts between these parties, and one of these contracts

not sued upon in this case was for peanut oil not to exceed two per cent fatty acid at arrival. The terms of the contract "net landed weight," can under no conceivable reasoning be held as qualifying the terms of the contract not to exceed three per cent fatty acid, as though they read "on arrival." In no other contract referred to is this expression used and the significance of the expression to my mind is so plain that the only interpretation that can be given to it is that the weight upon arrival at San Francisco should conform to the weight required in the contract. Within the authorities cited construing f. o. b. contracts, I am of opinion that in this contract the expression c. i. f. is deemed modified so as to make the contract one for delivery at San Francisco, and such seems to me to be the plain intention expressed by the contract itself. It is further urged that the letter of credit procured by the plaintiff referred to the contract as a c. i. f. contract, which is deemed to be significant as indicating a practical interpretation by the plaintiff of the meaning of the contract. To my mind that has little significance, however, as the contract was clearly a modified c. i. f. contract, to an extent to fix the liability of the seller to pay the freight and insurance, and to provide for a delivery at San Francisco. If the procurement of the letter of credit be deemed a practical interpretation by the plaintiff of the terms of the contract, the fact that the insurance policy was not attached to the bill of lading, nor sent to the plaintiff, might, on the other hand, be deemed an interpretation by the defendant of its liability for the risk of the voyage, in the retention of this policy of insurance to indemnify the defendant for the risk of transportation. The cases have held that under an ordinary c. i. f. contract, the policy of insurance should accompany the bill of lading, which was not done. In *Ireland v. Livingston* (L. R. 5 H. L. 395, 406) Justice BLACKBURN says: "The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance and the freight, as the case may be) and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee, which he is bound to accept (if the shipment be in conformity with his contract) on having

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handed to him the charter party, bill of lading *and policy of insurance.*" Little light, therefore, is thrown upon the interpretation of the contract by any practical interpretation given by the parties, and in view of what I deem to be the plain intendment of the contract as expressed in the words "net landed weight," I deem the right of the buyer established to receive at San Francisco the full weight stipulated for in the contract.

It is not necessary to discuss the question as to the rights of the plaintiff to establish his cause of action by supplementary affidavits, as that right does not seem to be challenged in the respondent's brief, and is clearly given by section 768 of the Code for the purpose of showing the existence of a cause of action, although the right may be denied under this Code provision for the purpose of showing the jurisdiction of the court.

The order should, therefore, be reversed, with ten dollars costs and disbursements, and the motion to vacate the attachment denied, with ten dollars costs.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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FLORENCE A. SMALLWOOD, Appellant, v. HIGBIE SMITH and  
Others, Respondents.

First Department, July 1, 1921.

**Corporations — suit to enjoin payment of excess salaries and for accounting — effect of agreement entitling preferred stockholders to dividends in proportion to salary paid — right of court to compel repayment — temporary injunction granted restraining payment of salaries — appointment of temporary receiver denied.**

In a suit by a preferred stockholder of a corporation to restrain the payment of excess salaries and for an accounting, it appeared that by the articles of incorporation the preferred stock was entitled to ten per cent yearly dividend and to three-eighths of any net profits beyond the sum

of \$30,000; that prior to the formation of the corporation an agreement was made for the benefit of preferred stockholders that the manager of the corporation would charge nothing for his services, but if he should receive any compensation therefor the same should be deemed the payment of dividends entitling preferred stockholders to a proportionate dividend; that in 1916 the manager and three others were voted salaries; that in 1917, 1918 and 1919 it was agreed between all parties that the net profits should not be paid in extra dividends, but should be held subject to the rights of all stockholders; that during said years the manager received an increased salary paid upon a resolution of the board of directors, but the increased salaries of the other three defendants were paid by the manager from a bonus voted to him at the end of each year; that the sole charge of mismanagement of the corporation which is entirely solvent is in the payment of the excess salaries.

*Held*, that the effect of the agreement for the benefit of preferred stockholders is not to prohibit the manager from receiving any compensation but as between the stockholders that such compensation so paid shall be deemed a payment of dividends from net earnings;

That the payment to the other three defendants of excess salaries over and above what would be a fair compensation for their services would be unlawful and in a proper action the court would compel repayment;

That the plaintiff is entitled to a temporary injunction restraining the payment of any salary to the individual defendants in excess of the salaries received by them in 1916, since the net assets of the corporation which might be reserved each year to pay to the plaintiff her proportion of the net profits, upon the assumption that the payment of the excess salaries was the payment of such profits, are insufficient;

That the plaintiff is not entitled to the appointment of a temporary receiver, since the corporation is financially sound and there is no claim that the individual defendants are not able to pay any judgment which may be rendered against them.

APPEAL by the plaintiff, Florence A. Smallwood, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of March, 1921, denying plaintiff's motion for the appointment of a temporary receiver and to restrain defendants from receiving or paying to the individual defendants, as officers and directors of the corporation, any salary or compensation in excess of the salaries paid prior to August 1, 1916, and from transferring, assigning or otherwise disposing of or interfering with the property and assets of the defendant Smith & Nichols, Inc., except to deliver them to the said receiver, and for such other relief to which the plaintiff may be entitled.

*George E. Blackwell* of counsel [*Blackwell Bros.*, attorneys], for the appellant.

*Clinton J. Ruch* of counsel [*Powell, Wynne & Roberts*, attorneys], for the respondent Elmore.

*Thaddeus G. Cowell* of counsel [*Lord, Day & Lord*, attorneys], for the respondents Stewart P. Drummond and others.

SMITH, J.:

Prior to August, 1913, the defendant Smith, with one Nichols, were copartners doing business in the city of New York. In that year the defendant Smith & Nichols, Inc., was organized with capital stock consisting of \$90,000 in preferred stock and \$60,000 in common stock. At this time William M. Smallwood had loaned the firm the sum of \$30,000. This indebtedness was canceled by Smallwood in consideration of the receipt of \$30,000 of the preferred stock. Nichols took \$60,000 of the preferred stock and the defendant all of the common stock. The preferred stock had no voting power, but by the articles of incorporation was entitled to ten per cent yearly dividend and to three-eighths of any net profits of the corporation beyond the sum of \$30,000. An agreement was entered into between Smith and Nichols prior to the formation of this corporation to the effect that Smith would charge nothing for his services in the management of the corporation, but if he should receive any compensation therefor, that the same should be deemed the payment of dividends as between the parties to said agreement, entitling Nichols to an apportionate dividend upon his preferred stock. While this agreement was in form between Smith and Nichols, it is sworn to by the plaintiff's attorney, who was then acting as the attorney for the copartners, that the agreement was for the benefit of the preferred stockholders and that it was so understood between the said Smallwood and Smith and Nichols. The claim of the attorney that the agreement was for the benefit of all the preferred stockholders seems to be sustained by a resolution passed at a meeting of the common stockholders in November, 1914, wherein it is recited that by

an agreement of said Smith with "the preferred stockholders of said corporation," he has agreed to serve without compensation, and that any sum paid to him nominally as compensation shall not be treated as expenses of the corporation in ascertaining the net profits thereof.

In August, 1916, Smith purchased Nichols' preferred stock. William M. Smallwood had died in 1913, and this plaintiff, his widow, became entitled to the stock under the will of Smallwood, which stock was soon thereafter transferred to her name. The plaintiff has received her dividend of ten per cent at all times since the organization of the corporation. In 1914, 1915 and 1916 she received an extra dividend which presumably amounted to one-eighth of the net profits of the corporation over and above \$30,000 as provided in the articles of incorporation. In 1917 it was agreed between all parties that the net profits of the corporation should not be paid in extra dividends at that time, but they should be held in the treasury of the company subject to the rights of all stockholders thereto upon any distribution thereafter to be made. In 1918 and 1919 a similar resolution was passed and agreed to by the attorney, Blackwell, who represented the plaintiff and who was in fact the plaintiff's brother. In November, 1916, the defendant Smith procured a resolution of the board of directors giving to him \$2,000 a month as salary to date from the fifteenth of August. In 1916 the defendant Elmore received a salary of \$7,880, the defendant Drummond \$1,592 and the defendant Bisland \$2,080. In 1917, 1918 and 1919 Smith received a salary of \$50,000. In 1917 Elmore received a salary of \$28,008; in 1918 and 1919 salaries of \$29,048. In 1917 Drummond received a salary of \$5,750 and in 1918 and 1919 of \$17,000 each year. In 1917 Bisland received a salary of \$3,770 and in 1918 and 1919 \$4,680 each year. The salary of Smith, the president, for the years 1917, 1918 and 1919 was paid upon a resolution of the board of directors, said resolution passed, however, in the latter part of each one of those years. The salaries of the other three defendants were not paid upon a resolution of the board of directors, but were paid by the defendant Smith from a bonus amount of \$50,000 voted to him at the end of each year, which he was to distribute as he thought wise. From this \$50,000 the

increased salaries were paid to these other defendants and it does not appear what was done with the balance of the \$50,000 given to him as a bonus in accordance with these resolutions.

The plaintiff contends that these salaries were unlawfully paid by reason of the agreement between Smith and Nichols made for the benefit of the preferred stockholders, and also as far as the bonus voted to the defendant Smith is concerned, from which the increased salaries of these other three defendants were paid, and that this bonus was voted after the rendition of the services, which action was illegal within *Godley v. Crandall & Godley Co.* (212 N. Y. 121), and the sole charge of mismanagement of this corporation made by the plaintiff is in the payment of these excess salaries, which are claimed to be illegal, and the use of the bonus, so far as the same was used otherwise than in the payment of these salaries. The company had at all times been prosperous and is now perfectly sound and without substantial indebtedness and it has liquid assets to the amount of about \$200,000. Upon this state of facts the plaintiff in her complaint has asked, *first*, for a receiver of the property of the corporation; *secondly*, that the individual defendants be required to account for and pay to said receiver the moneys unlawfully received by them as salaries for the years 1917, 1918 and 1919, and for the year 1920, as might hereafter be ascertained, and that the individual defendants be enjoined thereafter to pay to the said stockholders a dividend upon the preferred stock of said corporation for each year, which shall be equal to three-eighths of the net earnings of the said corporation as the same may be ascertained over and above the amount of \$30,000 in each of said years. *Or in the alternative*, that the payment of all salary to Smith be adjudged to be the payment of dividends, and that the defendants be ordered, as officers of the corporation, to set apart and pay to plaintiff sums equal to one-eighth thereof in each year with interest thereon from the 1st days of January, 1918, 1919 and 1920, respectively; and further that the defendants be enjoined from paying as salaries to the individual defendants any sum in excess of the salaries paid to them in the year 1916, and that during the pendency of this action a temporary injunction be granted to the same effect.



The effect of the agreement made by Smith with Nichols, claimed to be for the benefit of all preferred stockholders, is not to prohibit Smith from receiving any compensation for work done for the corporation, but as between the stockholders, that such compensation so paid shall be deemed a payment of dividends from net earnings. The payment to the other three individual defendants of excess salaries over and above what would be a fair compensation for their services would be unlawful and in a proper action the court would compel their repayment to the corporation by Smith and also by the individual defendants who have received any such unlawful salaries. All of these defendants reside without this State. Service has been made upon all except Smith who is apparently evading service of the summons by remaining away from the jurisdiction of the State. If the payment to Smith be deemed the payment of dividends from net profits, the plaintiff would be entitled to one-eighth of those net profits in excess of \$30,000 in each year as her share under the articles of association. The plaintiff would not be entitled to an injunction against the payment to Smith of any salary, provided the plaintiff received her rightful dividend, consisting of one-eighth of the said net profits over and above \$30,000, regarding the payment to Smith of salary as payment of dividends from net profits.

If we assume that the capital stock of the company was \$150,000, representing \$100 for each share of stock, and that the company has \$200,000 of liquid assets, there would not be enough net assets in the company in excess of \$30,000 which might be reserved each year to pay to her her proportion of the net profits upon the assumption that the payment of salary to Smith was the payment of net profits. Until the trial of the action, therefore, the plaintiff is entitled to an injunction restraining the payment of any salary to the individual defendants in excess of the salaries that they received in 1916, which is all that is asked for in the way of injunctive relief.

The appointment of a temporary receiver of a corporation is a drastic remedy which, by reason of the impairment of the credit of a corporation should not be granted unless it be necessary for the protection of the corporation or its stock-

holders. The claim of the defendant Smith is that his agreement with Nichols inured to the benefit of Nichols only and was not made for the benefit of any other preferred stockholder. If that be so, the corporation might lawfully pay any reasonable salary to any of its officers or employees which might be deemed an expense of the business to be deducted before the ascertainment of net profits. No necessity is shown for crippling the efficiency of this corporation by the appointment of a temporary receiver before the trial of the issues for a corporation which is absolutely sound and without any allegation that the individual defendants are not abundantly responsible and able to respond to any judgment which may be rendered against them. If this temporary injunction be granted restraining the payment of any salaries in excess of the salaries paid in 1916, any receiver appointed by the court would simply carry on the business of the corporation as it is now being carried on, as to which there is no claim of mismanagement except as to the payment of these salaries thus to be enjoined.

The order, therefore, should be reversed, with ten dollars costs and disbursements, and the motion granted as demanded in the application therefor for the injunction, and the motion as far as it asks for a temporary receiver should be denied.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ.,  
concur.

Order reversed, with ten dollars costs and disbursements, and motion granted as demanded in application therefor for an injunction, and so far as it asks for a temporary receiver denied. Settle order on notice.

JANET L. DURANT, Appellant, v. EDWARD C. CROWLEY, Individually and as Substituted Trustee, etc., and THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Respondents, Impleaded with LAWRENCE T. DURANT and Others, Appellants, and WILLIAM WEST DURANT, Defendant.

First Department, July 1, 1921.

**Trusts — trustee charged with loss from investment of trust funds because of failure to exercise proper care.**

In a proceeding to compel a substituted trustee to account, *held*, that the investment by said trustee of nearly one-half of the trust fund in one mortgage on property valued at less than twice the amount of the loan and highly speculative in its nature and very difficult to rent should it become unoccupied by the mortgagor, called for more care than was exercised by the trustee, although there is nothing to impugn his good faith, and he should be charged with the amount of the loan, with interest from the time the mortgagor failed to pay interest, and upon payment thereof the property should be conveyed to him individually.

APPEAL by the plaintiff, Janet L. Durant, and defendants Lawrence T. Durant and others, from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 20th day of August, 1920, on the findings and report of an official referee.

*Warren McConihe*, for the plaintiff, appellant.

*William H. Hamilton* [*N. C. Conklin* with him on the brief], for the defendants, appellants.

*Francis M. Scott* of counsel [*E. C. Crowley*, attorney in person], for the respondent trustee.

SMITH, J.:

In 1895 one William West Durant executed a trust agreement which was supplemented later by agreements in 1897 and 1898, depositing certain moneys with the Continental Trust Company, the income from which to be paid to his wife, Janet L. Durant, the plaintiff herein, for the benefit of her and the children mentioned until the children became of age,

when certain portions of the income should be paid to such children. The Continental Trust Company handled the matter for some time and then was consolidated with the New York Security and Trust Company which subsequently became the New York Trust Company. The beneficiaries under this agreement did not receive as large an income as they desired from the trust company as trustee, and when some of the children became of age and upon the application of the beneficiaries, the defendant Edward C. Crowley was substituted as trustee. One of the main reasons for such substitution was that Crowley would be more willing than the trust company to endeavor to increase the income from the trust fund. Crowley received about \$64,000 upon his qualifying as trustee, \$8,500 of which was by agreement between all the beneficiaries paid later to one of the beneficiaries, so that he had in hand some \$55,000 which he was seeking to invest. He did invest this money, and it is concerning one of the investments of \$25,000 that this litigation has arisen.

The plaintiff commenced this action to require Crowley to account, and upon a hearing an interlocutory judgment was entered directing the trustee to file his account and the proceedings upon the account, if objections were filed, should be had before an official referee. Crowley at no time objected to filing the account and so stated before the trial judge. One of the investments made by the trustee was in a \$25,000 mortgage on some property in the outskirts of Yonkers, which will be described more fully hereafter. The main contest in the matter was over this investment, the beneficiaries claiming that it was improvidently made by the trustee and that he should be charged with the investment. After a lengthy trial the referee found that the property was security for the loan at the time it was made, but suggested that the trustee should have exercised greater diligence in looking into the personal qualities of the Tweedys, one of whom was the mortgagor. Upon the referee's report coming before the Special Term for confirmation, the Special Term adopted the findings of the referee and confirmed his report, which overruled the objections to the \$25,000 investment and settled the accounts as rendered by the trustee.

Immediately after the appointment of the trustee in

September, 1909, he made several efforts to invest the fund, inquiring of different people for investments that would return six per cent, and found that he could not make investments in the city limits of New York that would pay more than four and one-half or five per cent. At the suggestion of some of the beneficiaries he investigated two or three different propositions outside the city limits, some of them at some distance from the city, but not being satisfied with them, declined to take the loans proposed. The trustee was acquainted with a man by the name of Blake who was a lawyer and in the employ at the time of the Title Insurance Company in New York city. He had been a resident of Albion, Orleans county, N. Y., the county adjoining the county in which the trustee lived before coming to New York, he being a former resident of Lockport, Niagara county. They had been well acquainted and the trustee, knowing that Blake was in the Title Insurance Company, asked him if he knew of any loans. Blake after a little time brought to him an application for the loan in question, which he learned of through a man by the name of J. L. Lewis, who was a lawyer formerly from Albion, but at the time practicing in New York. Lewis was then living near the residence of certain people named Tweedy, was acquainted with them and acted as their attorney. He knew their desire to obtain a \$25,000 loan on the property and told Blake of it. Blake submitted it to Crowley and Crowley suggested to him that he get a man by the name of Snyder, an appraiser, to make a report on it, and Blake arranged with Snyder to make such report. Lewis obtained a report from another appraiser by the name of Spock residing in Yonkers. These two appraisers made reports, one of them showing a value of the property at the time of \$40,000 and the other of \$42,200. Crowley examined the property two or three times, going through the house and over the grounds, and conferred with several people about the general locality. He learned that there were three mortgages on the property, one of \$10,000, and a second of \$2,000 on three of the lots, and a \$4,000 mortgage on two of the adjoining lots. He also learned that the husband of the proposed mortgagor, Mr. Tweedy, had retired from business and was interested in the development of a rubber reclaiming

process, and desired some money to put in its development, and that whatever money would remain after taking up prior liens and paying the expenses in connection with the mortgage, would go into that enterprise. The trustee had told Blake that he would have to get his commission out of the borrower, and Blake and Lewis, after some negotiation, arranged with the Tweedys that \$2,000 would be paid to cover commissions and all expenses in connection with the matter. This was eight per cent. The trustee accepted the \$25,000 mortgage and turned over the money in several checks to the Title Insurance Company to close the loan. There were upon the property at the time the loan was made unpaid back taxes for several years, and some tax sales on two of the plots but not on the buildings. These the trustee says he did not know were unpaid until the closing of the loan, and thinks he then saw it on the closing papers. All these taxes were paid out of the new mortgage money. Blake received as commission \$1,286, which is a trifle more than five per cent commission, which was the usual commission on such loans. The trustee, Crowley, was not acquainted with the lawyer, Lewis, and did not meet him until the time of his investigation of the property in question.

The property in question consisted of five plots, each of about 50 to 54 feet frontage, aggregating 260 feet of frontage and being 139 feet in depth on one side, and about 100 feet in depth on the other. A two-story-and-a-half house with stone foundation and cemented cellar was built upon one end of the tract, being the most elevated portion of the tract, and in the rear of it was a story-and-a-half stable, the first story of which was of stone, the upper story shingled, with stalls and carriage room and rooms overhead. The portion of the plot where the house was located was some 30 feet above the grade of Prospect Drive, on which the lots fronted, and the tract sloped down along this drive, so that the narrower end of the plot came substantially to grade. On the other side of the plot from Prospect Drive there was a street at right angles to this property and upon that street were several houses. The tract had several large trees upon it and from the site of the house a view could be had across the valley over a part of Yonkers and to the Hudson and

the Palisades beyond. The immediate approach from Prospect Drive up to the house was an abrupt rocky way, as the photographs show, but there was a driveway from Prospect Drive at the southerly end. In looking at the photographs and considering the descriptions of the property given by different witnesses, it seems that the property is a very special property, that it could be salable only to people who would like a view and would be willing to take it with the disadvantage of the rock outcrop. Being a special kind of property, there would be very little demand for it for rental purposes, so that if the same should become vacant, it would be difficult to rent it. At the time the loan was made the house was in fairly good repair. It had one bathroom and a bathtub and closet in the cellar. The stable was well constructed and in good repair and was convertible into a garage. The loan in question was made in December, 1909.

The Tweedys continued to occupy the property for a time after the loan was made and paid the interest for two years and a half, when they stated they could no longer pay the interest, having had reverses, and offered to give a deed of the property. The trustee told Blake, who had made the loan for him, that he ought to take the property and endeavor to dispose of it and make good the loan. A deed was taken from the Tweedys to Blake in 1912, and Blake continued to pay some interest on the loan. Some of the taxes were paid after the making of the loan until finally the trustee foreclosed the mortgage, when Blake ceased any efforts in connection with the matter. There were then due and unpaid taxes for 1914, 1915 and 1916. The trustee and Blake after the making of the loan continued to have business relations and the trustee invested the balance of the \$55,000 in five loans on Staten Island, through the instrumentality of Blake, who received commissions upon the loans. There is no question about these loans. After the making of the mortgage and about the time the Tweedys ceased paying interest, the trustee learned from them that they had rented the property for a time at \$150 a month, and later at \$125 a month. When the property was deeded to Blake he was unable to rent it for some time, and finally rented it on what the trustee calls a caretaking basis, the boys in the neighborhood having overrun

it somewhat and it having become dilapidated. It was rented for \$65 a month to a party who took care of the property, putting in such repairs as were necessary to live in it. The real estate was assessed for taxation purposes at the time the loan was made at \$9,000. The trustee learned of this valuation before he made the loan and says he inquired of people acquainted with the method of assessment and was told that assessments in that locality on *unimproved* real estate were at only about one-fifth of the value. The property in question was not unimproved. At the time the loan was made the house was about twenty years old and the stable some ten years old. The plumbing and furnace were also twenty years old. It appears from the evidence that in order to make the house salable at the present time at least \$6,000 must be expended on it to bring it up to the present requirements and either that sum must be expended or someone found as a purchaser who has "vision" enough to see the desirable features of the property to be willing to pay the above sum in addition to the sum necessary to make good the trust fund. It has been impossible to find such a purchaser although the property has been in the hands of real estate agents for several years.

The immediate beneficiaries are all of full age and were all of age at the time the loan was made except one son who was about nineteen years of age. The trustee thinks he told one of the *cestuis que trust* concerning this proposed loan, but two of the *cestuis que trust* swear he did not tell them, and at least there is no positive testimony that he did. Upon the trial the plaintiff swore three experts, one of whom had no knowledge as to the values at the time the loan was made, except as he has acquired information since that time. The other two testified that in their opinion the property was of the value of from \$17,500 to \$18,500. The defendant trustee had four experts, one of whom was the appraiser Spock, selected by the owner Tweedy. Of the others, Snyder, the original appraiser, placed the value at \$40,000. The witness Goodhart gave the value as \$39,000 and the witness Howe at \$33,000. These witnesses for the trustee all agree that the buildings were worth \$13,000 and they differ only as to



the land value. These witnesses, both those for the beneficiaries and for the trustee, give testimony which leads to the inevitable conclusion that the property upon which the loan was made was highly speculative in value and that it would be very difficult to find a purchaser or tenant, and this is verified by the events.

This investment of \$25,000, nearly one-half of the whole of the trust fund, in one mortgage and that on property highly speculative in its nature, very difficult to rent should it become unoccupied by the mortgagor, called for more care than was exercised by the trustee. Had he inquired more fully concerning the individuals obtaining the money from the loan, which the referee says he should have done, and had he inquired of the holders of the mortgages then existing on the property he would undoubtedly have learned facts which would have led him to doubt the correctness of the valuation placed on the property by his appraiser and by the property owner's appraiser. While there is nothing in the record to impugn the good faith of the trustee in making the investment in question, it must be held that the trustee did not exercise the care and foresight that an ordinarily prudent man should have exercised in his own affairs.

The judgment should be modified and the referee's report disallowed, in so far as it approves of the accounts submitted by the trustee. The interest on the \$25,000 loan seems to have been paid down to June 1, 1916, and the trustee should be charged with the \$25,000 loan and interest thereon from June 1, 1916. There are certain items in the account of rents received and disbursements made, from and concerning the property in question, all of which should be eliminated from said account and as the disbursements exceed the receipts by the sum of \$1,102.56, the trust account should be surcharged with that sum. Upon his paying into the trust fund the said sum of \$25,000 and interest from June 1, 1916, the Prospect Drive property should be conveyed to him individually. As so modified the judgment is affirmed, without costs.

DOWLING, MERRELL and GREENBAUM, JJ., concur.

Judgment modified as directed in opinion, and as so modified affirmed, without costs. Settle order on notice.

HENRY H. MAN, as Trustee under the Will of MARY E. MAN, Deceased, Respondent, v. ROBERT I. MAN and Others, Appellants, Impleaded with VERA MARCELLA MAN and Others, Defendants.

Second Department, May 6, 1921.

**Will — construction — bequest to individual by name and not simply as wife or widow.**

A testatrix devised a portion of her estate in trust, the income to be applied to a son and "his present wife," naming her, during their joint lives, and upon his death "if his said wife shall survive him" provided for the disposition of the principal, and further provided as to another portion of the trust estate remaining at the death of said son, that it should continue to be held in trust "during the life of the widow" of the son and the income applied to her use. In case of the expiration of the trust in favor of the son otherwise than by his death, the trustees were directed to pay the principal to him.

Provisions of the will construed, and held, that the wife of the son mentioned therein is entitled to take under said will although after the death of the testatrix she procured a decree of divorce and remarried.

The words "present wife" are significant and emphasize the point that she was the particular person. The subsequent words, "if his said wife shall survive him" and "during the life of the widow" of said son, are descriptive of the person and not of the character in which she was to take. The bequest was to the individual named and not to her simply as wife or widow.

APPEAL by the defendants, Robert I. Man and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Nassau on the 15th day of January, 1921, on the decision of the court rendered after a trial at the Nassau Special Term.

*Grenville T. Emmet* and *George W. Martin* for the appellants Albon P. Man, Jr., and another.

*George C. Wildermuth*, guardian ad litem, for defendants Vera Marcella Man and another.

*Otho S. Bowling* [*Robert H. Elder* with him on the brief], for the respondent.

Interlocutory judgment affirmed on opinion of Mr. Justice SQUIERS at Special Term, with costs of the appeal to those appearing and filing briefs, payable out of the estate.

BLACKMAR, P. J., MILLS, RICH, PUTNAM and JAYCOX, JJ.,  
concur.

The following is the opinion delivered at Special Term:

SQUIERS, J.:

The plaintiff brings this action to construe the 3d clause of the will of Mary E. Man, which reads as follows:

"As to all the rest, residue and remainder of my property, real and personal, I direct my executors to divide the same into as many shares as will make one for each son of my late husband, Albon P. Man, who shall be living at my death, one for the widow and issue collectively of each son of his who may have died in my lifetime, and one for the widow, if any of each said son who may have died in my lifetime, leaving no issue who shall survive me; and as to one of the said shares, I give, devise and bequeath one third thereof absolutely to Albon P. Man, son of my late husband, if he shall survive me, and I give, devise and bequeath the remaining two thirds thereof to William Man, Frederick H. Man and Henry H. Man, in trust to invest the same and keep the same invested, and to apply the net income thereof semi-annually or at other convenient periods, to the use of said Albon P. Man, during the joint lives of said Albon P. Man and his present wife, Marcella Man, and upon his death, if his said wife shall survive him, to divide two thirds of the principal remaining on hand into as many shares as he shall leave children, him surviving, and to apply the net income of each share allotted to any child of said Albon P. Man who may have been born during my lifetime, to the use of such child until such child shall attain the age of twenty one years, and thereupon to pay over such share to such child, and as to any share allotted to a child of said Albon P. Man born after my death, such share shall belong to such child; and as to the other one third of the trust estate remaining at such death of the said Albon P. Man, it shall continue to be held in trust by the same trustees during the life of the widow of said Albon P. Man, and kept

invested and the income applied to her use, and after her death, the principal shall go to the same persons and in the same shares who would take it by the laws of the State of New York if it were the property of said Albon P. Man then dying intestate. But in case of the expiration of the trust in favor of said Albon P. Man otherwise than by his death, then immediately upon such expiration the said trustees shall pay the principal of said trust fund to said Albon P. Man, to whom in that event I give the same absolutely."

Mary E. Man died on March 31, 1904. At the time of her death both Albon P. Man and Marcella Man were living. The testatrix, as disclosed by the evidence in the case, was cognizant of the fact that the married life of her son Albon P. and his wife was unhappy, and this unhappiness had been a condition for some years prior to the testatrix's death. Nevertheless the testatrix kept in touch with her daughter-in-law, Marcella, and made no change in her will. In 1905 Marcella, as testified by her, obtained in the courts of Minnesota, where she then resided, a decree of divorce against Albon P. Man. This decree was not offered in evidence, and it is not necessary for the court in this action to pass upon the question as to the validity of the decree. Subsequently, and in February, 1906, Marcella married one Alfred E. Clark, at the city of Richmond, Va.

In construing the clause of the will in question, it must be considered from the testatrix's standpoint at the time she executed it. It is clear that the testatrix had fully in mind those who had claims upon her, and had clearly in mind the relationship of the various beneficiaries to her. Furthermore, in construing the clause the court may and has taken into consideration the circumstances and conditions existing at the time of the execution of the will as disclosed by the testimony. After careful consideration the court is of the opinion that the testatrix intended that Marcella Man, should she survive Albon P. Man, should have the use of one-third of the trust estate remaining at the death of Albon P. Man, as provided in the 3d clause of the will. The words of the clause clearly indicate that Marcella was the particular person which the testatrix had in mind as the beneficiary under this clause of the will: the words "present wife" are significant and

emphasize the point that Marcella Man was the particular person. The later words in the clause "if his said wife shall survive him" and "during the life of the widow of said Albon P. Man" are descriptive of the person and not of the character in which she was to take. The relationship could not have been the sole motive of the provision, as the bequest was to the individual Marcella Man by name, and not to her simply as wife or widow. The instant case is even stronger than the case of *Davis v. Kerr* (3 App. Div. 323), cited by the attorney for Marcella Man. Paraphrasing the language of Mr. Justice WILLARD BARTLETT, at page 325: "Taking the whole trust clause together, it seems to me clear that whether she spoke of the wife or the widow of her son she meant Marcella Man, who was his wife at the time the will was made." In this quotation the court has simply substituted the name of Marcella Man for Zelia B. Sinclair.

If Marcella Man had predeceased Albon P. Man the trust created by this clause would have terminated and Albon P. Man would have taken the property absolutely. Therefore, no other "widow" than Marcella Man could have been intended.

This is supported also by the last sentence of the 3d clause of the will, which reads as follows: "But in case of the expiration of the trust in favor of said Albon P. Man otherwise than by his death, then immediately upon such expiration the said trustees shall pay the principal of said trust fund to said Albon P. Man, to whom in that event I give the same absolutely."

The court, therefore, sustains the claim of Marcella Man under the 3d clause of the will of Mary E. Man.

The plaintiff, Henry H. Man, desires to be relieved of his trust. The court holds that this relief should be given upon the passing of his accounts. The court, therefore, will provide in the decree for the appointment of a referee to take and state the account of the plaintiff trustee and his former cotrustee, and will make provision for the appointment of a substituted trustee in the final judgment. Mr. Almeth W. Hoff, attorney at law, at No. 34 Nassau street, New York city, will be appointed referee to take and state the accounts of the trustee.

ROBERT A. CHAPMAN, Appellant, v. WILLIAM K. DICK,  
Respondent.

Second Department, May 13, 1921.

**Libel — suit to compel specific performance of agreement to return corporate stock — allegation in answer charging plaintiff with conversion of funds of corporation and purchase of bonds therewith is privileged — scope of rule relating to absolute privilege.**

In a suit to compel specific performance of defendant's agreement to return stock of a corporation held as security, in which the plaintiff alleges that he is the president and treasurer and has the sole control and management of the corporation, the future of which will be greatly jeopardized if such management and control are interfered with, and also that he is the owner of a large portion of the outstanding bonds and is liable as an indorser on corporate notes, an allegation by the defendant that the plaintiff has appropriated to his own use large sums of money of the corporation and purchased bonds of the corporation therewith which he now claims to own, a demurrer to which was sustained, charges the plaintiff with the crime of grand larceny, but in view of the allegations of the complaint is relevant and pertinent and, therefore, absolutely privileged and does not render said defendant subject to an action by the plaintiff for libel. The rule relating to absolute privilege is sufficiently broad to extend to all matter otherwise libelous alleged or introduced in an action, which although ineffectual as a defense may by any possibility under any circumstances and at some stage of the proceeding be or become material or pertinent.

APPEAL by the plaintiff, Robert A. Chapman, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 19th day of January, 1921, granting defendant's motion for judgment on the pleadings.

*Jehial M. Roeder [Joseph Hirschman and Alfred Frankenthaler with him on the brief], for the appellant.*

*Henry F. Cochrane, for the respondent.*

Order affirmed, with ten dollars costs and disbursements, upon the opinion of Mr. Justice J. ADDISON YOUNG at Special Term.

BLACKMAR, P. J., MILLS, PUTNAM, KELLY and JAYCOX, JJ.,  
concur.

The following is the opinion of the court below:

YOUNG, J.:

This action is for libel and the defendant moves for judgment on the pleadings.

It appears from the complaint that prior to the commencement of this action the plaintiff instituted an action in this court against the defendant for the specific performance of an agreement under which the defendant held certain shares of capital stock of the Robert Chapman Company as security for a loan, which were to be returned to the plaintiff upon payment of the loan, and that plaintiff had tendered the balance due and demanded the return of the stock, which was refused, and that the defendant threatened to vote the stock at the annual meeting of the stockholders of the corporation and secure control of the election of directors and of the management of the corporation. The complaint in that action also alleged as follows: "That the said corporation was founded by the plaintiff; that the plaintiff is its president and treasurer; and that the plaintiff has had the sole control and management of the said corporation and is its active executive and managerial head and that the future of the said corporation will be greatly jeopardized if the management and control by the plaintiff is interfered with. That plaintiff organized and carried on said business. That the plaintiff is the owner of nearly one-third of the capital stock of the said corporation, that of the \$76,000 bonds issued and outstanding, the plaintiff owns \$50,000 and that of the remaining indebtedness of the said corporation aggregating \$55,000 and represented by notes, the plaintiff is the endorser and liable for the payment of the same."

The complaint in said action also alleged that the acts and conduct of defendant threatened irreparable injury to plaintiff unless he were enjoined and that the plaintiff had no adequate remedy at law and prayed the specific performance of the agreement, the return of the stock to plaintiff upon payment of the indebtedness, an injunction restraining him from holding the stock and restraining the corporation from holding any meeting until the redelivery of the stock to the plaintiff.

The complaint in the case at bar alleges that in that action the defendant caused to be served an answer which contained

the defamatory matter complained of. The particular paragraph containing the alleged libel is as follows: "On information and belief, between the 30th day of June, 1915, and the 19th day of June, 1920, the plaintiff has appropriated to his own use large sums of money, the property of the Robert Chapman Company, the amount of which cannot be determined except by an accounting, and has used and appropriated the money of the said Robert Chapman Company to purchase bonds of the said Robert Chapman Company, which bonds so purchased with the money of the said Robert Chapman Company the plaintiff, contrary to his right and duty and in violation of the trust relation which he bears to the said company now claims and holds as his own property. The amount of the funds and money of the said Robert Chapman Company so used and appropriated by the plaintiff cannot be ascertained and determined except by an accounting."

The complaint also alleges that the libelous matter was intended to and did charge the plaintiff with the crime of grand larceny. The complaint further alleges that he caused a demurrer to be interposed to the defense and counterclaim containing the libel and that the demurrer was brought on for argument and was sustained, and that the libelous statements were wholly incompetent, irrelevant and immaterial by way of answer or defense or counterclaim in said action, and were not pertinent to the issues therein.

The pleadings in the former action are annexed to the complaint, as well as the demurrer and order sustaining it, and are made a part thereof. It is contended by defendant that the matter complained of as libelous was absolutely privileged and that it did not, as alleged by plaintiff, charge the crime of grand larceny. The latter contention is, in my opinion, clearly unsound and requires no further consideration. The matter complained of, in my opinion, clearly charges a crime, and unless privileged, is libelous.

The serious question involved is that of absolute privilege. Upon this motion, of course, the allegation of fact contained in the complaint must be taken as true, as though a demurrer had been interposed. This, however, does not include the allegation that the alleged defamatory matter was impertinent and not privileged, which is, of course, a mere conclusion of law.



Privilege is usually a matter of defense, but if the complaint shows an absolute privilege on its face, it is demurrable (*Corwin v. Berkwitz*, 190 App. Div. 952), and, therefore, susceptible to this motion for judgment.

Nor should the defendant be barred from asserting the defense of privilege because of the order sustaining the demurrer in the former action (*Dada v. Piper*, 41 Hun, 254); nor by its recital that the demurrer was confessed. Such confession adds no more to the effect of the order than if it were granted after strenuous opposition. Whether the demurrer was sustained because the alleged counterclaim did not state a cause of action, or that it was one which could not be interposed, or that the allegations were insufficient as a defense, does not appear. Assuming it was sustained upon all the grounds asserted by plaintiff, the order in no way determines that the alleged libelous matter was not and could not possibly be relevant or pertinent to the issues; notwithstanding such determination, they might still be pertinent. In other words, in my opinion, the question of absolute privilege of the matter complained of is not to be tested as a mere matter of pleading. If it could possibly be pertinent or material the privilege is absolute.

The rule as to absolute privilege is a broad and liberal one, designed for the protection of counsel, parties and witnesses in a judicial action or proceeding. The rule itself is well settled, but its application to particular facts alleged has led to much controversy and is often difficult.

One of the earliest cases, decided nearly a century ago, is *Ring v. Wheeler* (7 Cow. 725). In that case the alleged slander was uttered by the defendant in addressing referees in a former action in which plaintiff had been a witness and charging the plaintiff with perjury. The case came before the court upon a motion in arrest of judgment, and the court held that the words proved were actionable in themselves unless justified by the occasion and manner of speaking, but said that on the motion in arrest they could not look out of the record and were not in a position to determine whether the charge made by defendant was pertinent to the cause or not, because the defendant had omitted to put the facts constituting his defense upon the record. The court, therefore,

denied the motion, saying that they were not authorized to say what did not appear, that the words were not spoken maliciously, that they were pertinent to the issue, that there was color for making the imputation and that they were not spoken with the design to slander plaintiff.

In *Hasting v. Lusk* (22 Wend. 410) the alleged slander was for speaking words charging plaintiff with perjury while testifying before a magistrate on the return of a warrant issued against defendant. The court in that case laid down the rule as to absolute privilege as follows: "Upon a full consideration of all the authorities on the subject, I think that the privilege of counsel in advocating the causes of their clients, and of parties who are conducting their own causes, belongs to the same class where they have confined themselves to what was relevant and pertinent to the question before the court, and that the motives with which they have spoken what was relevant and pertinent to the cause they were advocating, cannot be questioned in an action of slander. Thus far, it appears to be necessary to extend the privilege for the protection of the rights of parties; as those rights might sometimes be jeopardized if counsel were restrained from commenting freely upon the character of witnesses, and the conduct of parties, when such comments were relevant, for fear of being harassed with slander suits, and attempts to prove they were actuated by malicious motives in the discharge of their duty." (P. 417.)

*Gilbert v. People* (1 Den. 41) was an action for criminal libel consisting of matter set forth in the declaration in a former action for trespass for entering plaintiff's close and taking and killing divers sheep, etc., which charged that the defendant was reported to be fond of sheep, bucks and ewes and of wool, mutton and lamb, and in the habit of biting sheep, and that if guilty he ought to be hanged or shot. The court laid down the rule that "if what is said or written is pertinent and material to the controversy, the protection to parties and those who represent them (for all stand on the same ground) is absolute and unqualified, and no one shall be permitted to allege that it was done with malice," but held that the libel for which the defendant was indicted was not relevant or pertinent.

In *Garr v. Selden* (4 N. Y. 91) it appeared that an attorney had sued his client for professional services and the client gave notice that he would prove on the trial that the attorney conducted suits and attended to business for which compensation was claimed in so careless, unskillful, undue and improper manner as to render the services of no value. The attorney moved to strike out the notice as false and the client in resisting the motion filed an affidavit stating that plaintiff had revealed confidential communications made to him in his professional capacity by the defendant and relating to some portion of the business in question for the purpose of assisting another person who had an interest adverse to the defendant, and that plaintiff combined and colluded with that person to injure the defendant. The matter contained in this affidavit was alleged to be libelous, but it was held on demurrer that it was pertinent to the motion and, therefore, privileged and that no action for libel would lie.

In *Marsh v. Ellsworth* (50 N. Y. 309) the alleged libel was contained in filed objections to the discharge of a bankrupt in which the defendant charged the bankrupt with procuring plaintiff to testify falsely as to who were partners in a firm and as to the connection of the bankrupt therewith, and it was held that the question as to whether the evidence of plaintiff was true or false was material and pertinent and, therefore, privileged.

In *Aylesworth v. St. John* (25 Hun, 156) the alleged libel consisted in the addition by a justice of the peace to an amended return to the County Court, which stated that the plaintiff had slipped a bogus answer among the justice's papers. The court said that the alleged libel was made in the course of a judicial proceeding and was, therefore, privileged, *first*, if it was pertinent and material, or *second*, if the defendant believed it to be pertinent and material, and whether he did so or not is a question of fact, and that as the testimony was not before the court, they could not say that the referee was not justified in holding that the defendant believed the alleged libel to have been pertinent and material. The case last cited does not seem to pass upon the question of absolute privilege of the alleged libel, but makes the privilege dependent upon a question of defendant's belief as to whether it was

pertinent or material. This seems to be contrary to the general doctrine that where the facts are undisputed the question as to whether they were pertinent or material was one of law for the court. It would seem, therefore, that the libel in the case was in effect held to be not pertinent or material and, therefore, to give only a qualified privilege dependent only upon the defendant's belief.

In *Moore v. M. N. Bank* (123 N. Y. 421) the alleged libelous matter was contained in a statement made to the sureties on the bond of a defaulting cashier and repeated in a bill of particulars in an action on the bond which purported to contain an account of cash items drawn from the bank *by collusion with the teller* without the knowledge or authority of the officers of the bank. The teller was the plaintiff in the libel action, and it was held in substance that the words complained of were not privileged because not relevant or pertinent to the issues in the action on the bond.

In *Link v. Moore* (84 Hun, 118; *affd.*, 156 N. Y. 661) the alleged libel consisted of allegations in a complaint in an action brought by the defendant against his wife for a divorce, which alleged adulterous intercourse between her and the plaintiff, and it was held that as these allegations were pertinent and material they were absolutely privileged.

In *Youmans v. Smith* (153 N. Y. 214) the alleged libel was contained in certain proposed questions prepared and caused to be printed by an attorney for use in disbarment proceedings against the plaintiff. These questions related to plaintiff's general character in the community, his character for truth and veracity, for bearing false witness, for insulting, traducing and villifying people, etc. The court held that the matter complained of was absolutely privileged, and said (pp. 219, 220): "In applying this principle [of absolute privilege] the courts are liberal, even to the extent of declaring that where matter is put forth by counsel in the course of a judicial proceeding that may *possibly* be pertinent, they will not so regard it as to deprive its author of his privilege, because the due administration of justice requires that the rights of clients should not be imperiled by subjecting their legal advisers to the constant fear of suits for libel or slander."

The court further said (pp. 222, 223): "The questions might

have been prepared and printed for use in connection with a commission to examine absent witnesses, or to be used by counsel as a part of the trial brief. As they were not so manifestly immaterial that under no circumstances could they be asked upon the trial, we think that the drafting and the printing of the same was privileged and protected both the attorney and his employees against a prosecution for libel. Whatever he wrote, or they printed for him, that was material to the ordinary course of justice in the judicial proceeding pending at the time, was not actionable, because, upon grounds of public policy, the law made it privileged in order that counsel, having a duty to discharge, might write or 'speak with that free and open mind which the administration of justice demands.' "

In *Sickles v. Kling* (60 App. Div. 516) the alleged libel was contained in a brief prepared and presented by defendant on an appeal from an order appointing a receiver, in which it was stated concerning the plaintiff: "She became Allen's agent while they were related together in the city of New York, since which time she has formed a new relationship with one Sickles." The plaintiff claimed that these words charged her with being unchaste, but the court held that even if the words complained of must be taken in that sense, they were privileged, saying (pp. 520, 521): "Advocacy implies argument. So pertinence is made the test of this privilege, which is but the principle of free speech in the administration of justice. This test protects him attacked by the advocate, for it does not prevent redress of accusations made without the facts; it protects, too, the advocate, for it assures to him the play of his reason within the facts. The advocate does not speak mindful of another day when he will be called upon to justify his inferences as if they had been charged as facts or to vindicate his conclusions by the axioms of logic. His conclusion may be lame and impotent, his inferences far-fetched or feeble, but so long as they can be deemed to be possibly pertinent, so long are they protected."

In *Rosenberg v. Dworetzky* (139 App. Div. 517) the alleged libel was contained in a petition filed by the defendant in a bankruptcy proceeding wherein he stated that the alleged bankrupt immediately before making a general assignment

had removed certain goods from the store and concealed same with intent to defraud his creditors, and that a large part of these goods was in the possession of the plaintiff, naming him, and were being offered for sale by him at a price much less than the market value. The court held that the matter complained of was privileged and sustained a demurrer to the complaint.

In *Lesser v. International Trust Co.* (175 App. Div. 12) statements contained in a petition in bankruptcy setting out an alleged conspiracy between plaintiff and others to obtain moneys by false pretenses and frauds relating to the purchase of merchandise and by fraudulent bankruptcy proceedings were held to be privileged and could not be made the basis of an action for libel where the words were material and pertinent to the questions involved in the bankruptcy proceedings, and this irrespective of the motive with which they were used. In that case the alleged libelous matter had been stricken out of the petition by the district judge as "irrelevant, impertinent and scandalous," but the Appellate Division held that this fact did not deprive them of their privileges; that if they were pertinent the fact that they were insufficiently alleged made no difference. In that case it was also held that the further statement contained in the petition in bankruptcy that the plaintiff was a fugitive from justice was not pertinent in any way to the subject-matter and did not come within the privilege.

In *Gallagher v. Surpless* (163 N. Y. Supp. 551) it was held that objections to the account of an administratrix were not actionable, though they specified failure to account for the value of a pawn ticket delivered to plaintiff, who was entitled to no share in the estate, and charged the plaintiff was indebted to the estate of the deceased in the sum of \$2,000 taken from the clothes of the deceased; that such statements were pertinent to the inquiry and absolutely privileged.

I think that under the above authorities the rule relating to absolute privilege is sufficiently broad to extend to all matter otherwise libelous alleged or introduced in an action which, although ineffectual as a defense, may by any possibility, under any circumstances, and at some stage of the proceeding be or become material or pertinent.

Tested in this way, could the matter complained of in the case at bar by any possibility be relevant under any circumstances at some stage of the proceedings in the action?

Defendant urges that the alleged libel was pertinent and material in answer to the allegations contained in the 8th paragraph of the complaint, quoted above, in which plaintiff alleged ownership of the bonds. Ordinarily, it would hardly seem that in an action seeking the recovery of certain shares of stock the ownership of bonds not the subject of the action, were relevant or pertinent, nor that plaintiff's allegations in the complaint of such ownership would make it pertinent or material. But a close analysis of the complaint shows that there was something more involved in the former action than the mere ownership of the stock; something more than the plaintiff's right to its recovery as property of value. If that were all, probably plaintiff's remedy at law for damages would have been adequate. The ownership of the stock, however, was a mere incident to a far greater right which plaintiff was seeking to attain; that is, the control and management of the corporation. The suit was, therefore, brought in equity to compel specific performance of defendant's agreement to return the stock upon the payment of the indebtedness, and in such an action it was essential that plaintiff show that he would suffer irreparable damage unless this relief were afforded him and that an action at law for the value of the stock as damages would be utterly inadequate, because he would lose the control and management of the corporation, a right so valuable that in comparison the value of the stock became insignificant. Seeking such relief in equity every fact which could possibly be alleged in his complaint, showing the necessity and value to him of this right of control, was of importance to establish that the right was a valuable one not to be measured by the mere value of the stock as damages, and that unless return of the stock were compelled in equity, he could secure no adequate relief. This, it seems to me, was clearly the purpose of alleging in his complaint, not simply the agreement with defendant and plaintiff's right to the stock upon payment of the indebtedness, but also facts showing the importance and value to him of the control of the corporation, and that defendant's refusal

to return the stock threatened plaintiff with the loss of such control. He, therefore, alleged in substance that he founded the corporation, was its president and treasurer, and had had its sole control and management; that its future would be greatly jeopardized if such management and control were interfered with; that he organized and carried on the business, owned nearly one-third of the capital stock, and that of the \$76,000 in bonds issued and outstanding he owned \$50,000, and that of the remaining indebtedness of the corporation, aggregating \$55,000, he was the indorser and liable on its notes. It seems to me that viewed in this light the allegations contained in plaintiff's complaint were more than mere surplusage; they were relevant and material to support his right to specific performance of defendant's agreement in equity. I do not think, therefore, that it can be said that the matter alleged by defendant in his third defense and counterclaim, which controverted plaintiff's ownership of the bonds, was not relevant or pertinent. It is true that defendant might have raised the question of ownership by a simple denial, but it seems to me that he might go further and set up in addition facts tending to disprove plaintiff's ownership, and that such acts would be pertinent and material.

I think also there is another aspect in which the alleged libel might have been material and pertinent. Plaintiff, among other things, prayed for an injunction restraining the defendant from voting the stock and the corporation from holding any meeting of its stockholders until plaintiff had secured the stock. Upon a motion for a preliminary injunction can it be said that the alleged libelous matter could not have been interposed by the defendant in answering affidavits seeking to put in issue plaintiff's right to control and manage the corporation? Clearly it seems to me that upon such a motion it would have been both material and pertinent.

Other incidents might be noted showing the relevancy and pertinency of the alleged libel to the issues in the former motion, but I think sufficient already appears to bring it within the rule as to absolute privilege.

The motion for judgment on the pleadings is, therefore, granted.



THE PEOPLE OF THE STATE OF NEW YORK ex rel. AGINS & KLUGERMAN, INC., Respondent, v. THE BOARD OF HEALTH OF THE DEPARTMENT OF HEALTH OF THE CITY OF NEW YORK, Appellant.

First Department, July 1, 1921.

**Municipal corporations — city of New York — alternative writ of mandamus to compel vacation of order of board of health revoking relator's permit to sell milk — powers of board administrative — writ will not issue where there is no abuse of discretionary power.**

An alternative writ of mandamus will not issue to require the board of health of the city of New York to vacate an order which revoked the relator's permit to sell milk and milk products, where it appears that the relator's record of violations of the Sanitary Code were numerous, and that the action of the board was not capricious, unreasonable or arbitrary. The powers of the members of the board of health being administrative merely, they can issue or revoke permits to sell milk in the exercise of their best judgment, and their action is not subject to review unless it is arbitrary, tyrannical or unreasonable, in which case the remedy is mandamus.

APPEAL by the defendant, The Board of Health of the Department of Health of the City of New York, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of May, 1921, as directs the issuance of an alternative writ of mandamus requiring it to vacate, set aside and revoke an order of said Board of Health which revoked the permit of the relator theretofore issued by it in 1920 to sell milk and milk products in the city of New York.

*Willard S. Allen* of counsel [*George P. Nicholson, John F. O'Brien* and *Russell Lord Tarbox* with him on the brief; *John P. O'Brien, Corporation Counsel*, attorney], for the appellant.

*Benjamin F. Schreiber* of counsel [*Alfred Rathheim* with him on the brief; *Schreiber & Collins*, attorneys], for the respondent.

GREENBAUM, J.:

Defendant's authority to issue milk permits is conferred by section 155 of the Sanitary Code which in part reads as follows: "No milk, skimmed milk or cream, condensed or

concentrated milk, condensed skimmed milk or modified milk shall be held, kept, offered for sale, sold or delivered in the City of New York without a permit issued therefor by the Board of Health or otherwise than in accordance with the terms of said permit and with the regulations of said Board. \* \* \*” (See Code of Ordinances of City of New York, chap. 20, § 155.)

The practically undisputed facts appearing from the papers before us are as follows: The previous record of Agins, relator's president, is that on September 15, 1916, he was fined fifteen dollars in the Court of Special Sessions for violation of section 152 of the Sanitary Code, for offering for sale adulterated cream; that on or about February 2, 1917, he was fined five dollars in the Municipal Term for violation of section 331, subdivision b, of the Sanitary Code for having in his possession two pounds of unwholesome eggs; that on or about May 1, 1918, he was fined ten dollars in the Municipal Term for violation of section 152 of the Sanitary Code, for offering for sale cream which was found to be below the standard required by law, and that on or about October 25, 1918, he was fined fifty dollars in the Municipal Term for violation of section 152 of the Sanitary Code, for offering for sale cream below the legal standard.

In or about the month of January, 1920, Agins, together with others who were theretofore engaged in the sour cream business, organized the relator corporation under the name of Agins & Klugerman, Inc.

On June 23, 1920, a permit was issued to the relator upon its assurance that it would comply with the provisions of the Sanitary Code.

In July, 1920, relator's president was summoned to the office of the acting director of the bureau of food and drugs of the department of health of the city of New York and notified that the bureau had found at different times five samples of cream offered for sale by the relator which were adulterated with foreign fat or were otherwise below the standard, and he was then warned that unless that practice was discontinued immediately it would be subjected not only to prosecution, but also to revocation of the permit issued to the relator. These five cases subsequently came on for trial;

in one the relator was convicted on September 17, 1920, in the Court of Special Sessions for violation of section 152 of the Sanitary Code in selling cream below the standard and sentence suspended. In the other four cases it was convicted on January 13, 1921, in the Court of Special Sessions for violation of section 152 of the Sanitary Code in offering for sale cream containing a foreign fat and was fined twenty-five dollars for each of the four offenses.

Despite the warning of the acting director of the department, samples of cream below the standard were found in the possession of the relator on five other occasions.

On February 9, 1921, the acting director recommended the revocation of the permit issued to the relator.

On March 11, 1921, the relator was convicted on three of the charges in the Municipal Term for violation of section 152 of the Sanitary Code and was fined \$150 for each of the three offenses.

On March 24, 1921, the board of health revoked the relator's permit. The remaining charges were then pending trial.

The defendant is charged with duties of the highest importance to the health of the community and the exercise of the power vested in it by law to revoke licenses will not be disturbed by the court excepting where its action is arbitrary, tyrannical or unreasonable.

In *People ex rel. Lodes v. Department of Health* (189 N. Y. 187) the court in the prevailing opinion said: "The powers of the members of the board of health being administrative merely, they can issue or revoke permits to sell milk in the exercise of their best judgment, upon or without notice, based upon such information as they may obtain through their own agencies, and their action is not subject to review either by appeal or by certiorari. (*Child v. Bemus*, 17 R. I. 230; *State ex rel. Cont. Ins. Co. v. Doyle*, 40 Wis. 220; *Wallace v. Mayor, etc., of Reno*, 63 L. R. A. 337.) If, however, their action is arbitrary, tyrannical and unreasonable, or is based upon false information, the relator may have a remedy through mandamus to right the wrong which he has suffered."

From the record before us it conclusively appears that the relator does not come into court with clean hands. Moreover, there is not the semblance of a fact in relator's petition which

even remotely suggests that defendant's action was "capricious, unreasonable or arbitrary" as relator asserts.

Since there is no fact presented indicating that the defendant abused its discretionary power, no alternative writ should have been granted. The order appealed from is reversed, with ten dollars costs and disbursements, and the motion for the writ denied, with fifty dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ.,  
concur.

Order reversed, with ten dollars costs and disbursements, and motion denied, with fifty dollars costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. FEINSMITH & COMPANY, INC., Respondent, v. THE BOARD OF HEALTH OF THE DEPARTMENT OF HEALTH OF THE CITY OF NEW YORK, Appellant.

First Department, July 1, 1921.

See head note in *People ex rel. Agins & K., Inc., v. Bd. of Health* (ante, p. 562).

APPEAL by the defendant, The Board of Health of the Department of Health of the City of New York, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of May, 1921, as directs the issuance of an alternative writ of mandamus requiring the Board of Health of the Department of Health of the City of New York to vacate, set aside and revoke an order of said Board of Health which revoked the permit of the relator theretofore issued by it to sell milk and milk products in the city of New York.

Willard S. Allen of counsel [George P. Nicholson, John F. O'Brien and Russell Lord Tarbox with him on the brief; John P. O'Brien, Corporation Counsel, attorney], for the appellant.

Benjamin F. Schreiber of counsel [Alfred Rathheim with him on the brief; Schreiber & Collins, attorneys], for the respondent.

GREENBAUM, J.:

The facts in this case are in their essential aspects analogous and similar to those appearing in the case of *People ex rel. Agins & K., Inc., v. Bd. of Health* (197 App. Div. 562), submitted simultaneously with the instant appeal.

For the reasons stated in the *Agins Case* (*supra*) the order directing an alternative writ is reversed, with ten dollars costs and disbursements, and the motion for the writ denied, with fifty dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ.,  
concur.

Order reversed, with ten dollars costs and disbursements.  
and motion denied, with fifty dollars costs.

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In the Matter of the Transfer Tax upon the Estate of  
MARY CAREY, Deceased.

CLEMENTINE FARR DUFF, as Executrix, etc., of JOHN J.  
DUFF, Deceased, Appellant; EUGENE M. TRAVIS, State  
Comptroller, Respondent.

First Department, May 27, 1921.

**Taxation — transfer tax — order fixing tax not res judicata preventing appointment of appraiser upon discovery of additional assets — no presumption in absence of specific finding in appraiser's report that value of assets was ascertainable or that his failure to report was equivalent to finding of exemption.**

Where neither the appraiser's report nor the order in transfer tax proceedings fixing the tax mentioned assets which were not disclosed to the appraiser by the executrix in her petition, and which may now be valued for the purpose of fixing the transfer tax, said order is not *res judicata* and an appraiser may be appointed to value said assets.

In the absence of a specific finding in the appraiser's report in the original proceeding it will not be presumed that the value of the aforesaid assets was ascertainable nor that his failure to report them as subject to taxation is equivalent to a finding that they were exempt.

APPEAL by Clementine Farr Duff from an order of the Surrogate's Court of the county of New York, entered in the

App. Div. 566]

First Department, May, 1921.

office of said surrogate on the 31st day of January, 1921, denying the application of said appellant for an order vacating an order entered in said surrogate's office on or about the 15th day of October, 1920, appointing Clarence Schmelzel transfer tax appraiser.

*Millard F. Johnson* [*Howard C. Taylor* of counsel], for the appellant.

*William W. Wingate*, for the respondent.

Order affirmed, with ten dollars costs and disbursements, on opinion of FOLEY, S.

Present — CLARKE, P. J., DOWLING, PAGE, MERRELL and GREENBAUM, JJ.

The following is the opinion of the surrogate:

FOLEY, S.:

Application is made to vacate the order appointing the appraiser on the ground that the estate is not subject to a further transfer tax. The application is denied. At the time of her death, May 3, 1913, the decedent had a reversionary interest in one-half of the estate of her father, Michael Duff. This reversion then passed to her brother, John Duff, as her heir at law and residuary devisee, and upon his death this interest became vested in possession. (*Matter of Duff*, 114 Misc. Rep. 309; *Duff v. Rodenkirchen*, 110 id. 575, 583; *affd.*, on opinion below, *sub nom. Duff v. Fox*, 193 App. Div. 898.) The latter decision is controlling here. In the transfer tax proceedings taken after her death this interest was not taxed. It was clearly an asset of her estate not disclosed to the appraiser by the executrix in her petition in those proceedings. It is now possible to fix the value of the transfer because of the death of the brother without issue and without exercising the power of appointment, and further because of the judgment in *Duff v. Rodenkirchen* (*supra*) construing the will. The previous order fixing tax is not *res adjudicata*. Neither the report nor that order mentioned the asset. (*Matter of Goldenberg*, 187 App. Div. 692, 695; *Matter of Naylor*, 189 N. Y. 556; *Matter of Ely*, 157 App. Div. 658.) In the absence of a specific finding in the appraiser's report it will not be presumed that the value of the remainder was ascertainable nor that

his failure to report them as subject to taxation is equivalent to a finding that they were exempt. (Surrogate FOWLER in *Matter of Ely*, 149 N. Y. Supp. 40.) Although a copy of the will of Michael Duff was annexed to one of the affidavits in the original proceedings, no disclosure of any reversion or remainder was made, and the will was only supplied to verify the amount due her on her death upon an annuity in a paragraph separate from that creating the life estates and powers. Submit order on notice.

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CRONK & CARRIER MANUFACTURING COMPANY, Respondent,  
v. GALBRAITH MILLING COMPANY, Appellant.

Third Department, May 17, 1921.

**Sales — action to recover purchase price of gasoline engine — contract of sale or return — title passed on delivery by seller to railroad for shipment — buyer liable for purchase price where he failed to return engine within time limited, though engine destroyed by explosion before test or trial.**

An order for a gasoline engine, which read in part as follows: "You may ship us the 50 HP Gasoline Engine at 550.00 f. o. b. cars Montour Falls, N. Y. 30 days net. If the engine does not do our work we to ship it elsewhere after giving it a trial," and the shipment of the engine by the seller constituted an absolute contract of sale, with an option on the part of the buyer to rescind the sale and to return the engine, and the title passed to the buyer immediately on delivery to the railroad at the point of shipment.

The buyer not having returned the engine within the time limited by the contract was liable for the contract price, though the engine exploded and was destroyed, without any negligence on the part of the buyer, before it could be tested or tried.

APPEAL by the defendant, Galbraith Milling Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Chemung on the 11th day of July, 1919, upon the decision of the court rendered after a trial at the Chemung Trial and Special Term without a jury.

*John F. Connor*, for the appellant.

*Lewis Henry*, for the respondent.

Judgment unanimously affirmed, with costs, on the opinion of Mr. Justice McCANN at the Trial Term.

The following is the opinion of the court below:

McCANN, J.:

This action is brought by plaintiff to recover \$550 as the purchase price of a certain gasoline engine alleged to have been sold by plaintiff to defendant under a written contract.

The answer denies the material allegations of the complaint and alleges, as a separate defense, that the engine in question was shipped by plaintiff to defendant under an agreement, prior to the written one, and pursuant to which plaintiff was to deliver the engine to defendant for trial, with the understanding that if the engine was unsatisfactory, the defendant was privileged to deliver the same to the railroad for shipment to any point directed by the plaintiff. The answer also alleges that after receiving the engine, defendant set up the same for operation, but that before it could be used, tested or tried, it exploded and was wrecked and destroyed without any negligence on the part of the defendant.

The case was brought to trial before a jury. Plaintiff offered in evidence the written instrument under which it claimed. It was received, marked "Exhibit A" and reads as follows:

" MT. MORRIS, N. Y., *July 29, '14*

" THE CRONK & CARRIER MFG. Co.

" Elmira, N. Y.:

" You may ship us the 50 HP Gasoline Engine at 550.00 f. o. b. cars Montour Falls, N. Y. 30 days net. If the engine does not do our work we to ship it elsewhere after giving it a trial.

" Advise the size of bed plate at once and if you can do so let them know where the bolts come.

" Yours truly,

" GALBRAITH MFG. CO.

" Ship at once.

Ship via quickest route."

At the close of the plaintiff's case the defendant offered to make proof of the installation and trial of the gasoline engine by the defendant. Objection was offered and after



some discussion a stipulation was entered into as follows: "It is stipulated that if the contract, Exhibit A is a contract of sale *in presenti*, to take effect upon delivery to the railroad company of the machine or that the title passed upon such delivery, then the plaintiff is entitled to recover in this action; but that if it is a contract of sale, with the privilege of trial before the title passed, then the plaintiff is not entitled to recover in this action, and the only question is the question raised under this stipulation and to be left to the court to determine."

After making such stipulation, both parties moved for the direction of a verdict. The question therefore, becomes a matter of law and the decision of it depends upon the interpretation of the above written order or contract.

I believe that the contract in question is a contract of absolute sale, with an option on the part of the defendant to rescind the same and to return the engine and that the title passed upon the delivery of the engine to the cars at Montour Falls, N. Y., such delivery being conceded by the stipulation.

The letter from the defendant to plaintiff contains a direct order for a shipment, at a specified price and delivery to a specified place. The purchase price is named, also the terms under which payment is to be made. It only remained for the plaintiff to accept this order and to deliver the engine in question on board the cars as indicated, to make the contract complete and binding upon both parties thereto. The defendant claims that the language "if the engine does not do our work we to ship it elsewhere after giving it a trial," brings the contract within the class of cases which permit a trial of the article purchased, before the sale is completed, and nearly all of the cases cited by defendant are those in which a trial preceded the actual purchase.

In this case, all of the conditions of the contract had been performed upon the part of the plaintiff and the sale was completed and there was nothing further for plaintiff to do. At the expiration of thirty days after delivering the engine on the cars at Montour Falls, plaintiff was in a position to commence action for the recovery of the purchase price. It remained for the defendant to make the trial and test referred to, and if, after such trial, the engine was found to be defective

or would not do defendant's work, it was the duty of the defendant to return it. Until such return the engine was the property of defendant and any loss sustained by it due to the injury to the engine by explosion or otherwise, was a loss which fell upon the owner, or in other words, the defendant.

Rule 3, as laid down in section 100 of the Personal Property Law (as added by Laws of 1911, chap. 571), is applicable in arriving at the intention of the parties herein:

"Rule 3. 1. When goods are delivered to the buyer 'on sale or return' or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time."

The rule has also been clearly stated in *Greacen v. Poehlman* (191 N. Y. 497), where the court in quoting from another opinion says: "The contract in this case belongs to a class of contracts often called 'contracts of sale or return' being upon a condition that the buyer may return the goods within a fixed or reasonable time at his option. It has been held that goods so sold pass to the purchaser, subject to the option in him to return them, and that if he fails to exercise the option within the proper time the price of the goods may be recovered as upon an absolute sale."

I find, therefore, that the contract in question was a contract of sale, which was completed upon the part of the plaintiff by delivery of the engine in question and that the plaintiff is, therefore, entitled to recover.

Judgment is ordered accordingly.

BERT A. FOWLER, Appellant, v. ELIZABETH M. FOWLER,  
Respondent.

Third Department, May 24, 1921.

**Equity — suit to set aside deed and separation agreement on ground of fraud and duress — plaintiff's arrest and holding for grand jury not unlawful — laches.**

In a suit to set aside a deed and separation agreement on the ground of fraud and duress in which it appeared that the defendant caused the plaintiff to be arrested for assault and he was indicted for assault in the second degree and pleaded guilty to assault in the third degree, receiving a suspended sentence, evidence examined, and *held*, that the plaintiff's arrest and holding for the grand jury were not for an unlawful or improper purpose and that the plaintiff in executing the instruments acted of his own free will and not as the result of constraint or coercion, and also that at the time of the execution of the separation agreement the defendant had a good cause of action against the plaintiff herein.

Furthermore, the failure of the plaintiff to repudiate the deed and the agreement for more than two years after they were executed precludes him from now claiming that they were executed under fraud and duress.

APPEAL by the plaintiff, Bert A. Fowler, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Broome on the 7th day of September, 1920, upon the decision of the court rendered at a Trial and Special Term without a jury dismissing the complaint on the merits.

*F. N. Gilbert*, for the appellant.

*Urbane C. Lyons*, for the respondent.

Judgment unanimously affirmed, with costs, on the opinion of TUTHILL, J., at Trial Term. KILEY, J., not sitting.

The following is the opinion of the court below:

TUTHILL, J.:

This action was commenced on or about September 5, 1919, to set aside a deed executed and delivered by the plaintiff to the defendant, his wife, on October 24, 1916, and also a separation agreement between the parties of like date, on the ground of fraud and duress.

The contention of plaintiff is that during the night of

August 14, 1916, in their home in Johnson City, N. Y., he was brutally assaulted by his wife, resulting in most serious injuries of a permanent nature, from which he is still suffering, and also compelling him to submit to two operations.

The plaintiff further claims that the defendant caused his arrest, alleging that *he* assaulted her; that he was subsequently indicted for assault in the second degree and was in jail awaiting trial for about two months; that his counsel betrayed him; that he pleaded guilty to assault in the third degree and received a suspended sentence under a misapprehension and misrepresentations; that he was bewildered and incompetent to execute the deed and separation agreement, and did so without comprehending the nature of his act, all of which he asserts was the result of a conspiracy in which his wife was the principal. The defendant's motives, plaintiff asserts, were to secure his equity in the property he conveyed and his wife's desire to rid herself of him after she had completely stripped him of his property. It will serve no useful purpose to recite all the details given by the plaintiff of the alleged assault. I am satisfied from plaintiff's statement and observing him as a witness that his story is the result of a fertile imagination and the brooding over his troubles until it has become almost, if not quite, a delusion. In many respects his statements of the occurrences between himself and his wife on the night in question are not only most improbable but unbelievable. For instance, he swears that during the battery, "She struck me in the back with a cobble-stone, and broke the sixth vertebra in the spine. \* \* \* Then she came back and kept hanging [around] and finally she up and gave a stamp on the left foot and took the toenail off clean." In describing a portion of the scene he says: "Then she went in the next room, in the dining room; came back and laid on the bed beside me with her left hand off of the bed with a stone in it. Then in a couple of minutes gave a lunge on her feet and grabbed her hands on her wrists; grabbed her hair over her face and jammed her head on the left side of the door." To expect belief in such and similar testimony of plaintiff is overtaxing credulity.

Previously and particularly during the summer of 1916, there had been domestic trouble between the parties, resulting

largely from plaintiff's intemperate habits, and the defendant had complained of his failure to properly support her and their child. The defendant appears to be a thrifty, hard-working woman, and by her needle was able to earn her own way and a modest accumulation, part of which at least she loaned plaintiff. The amount of the loan is disputed. On September 23, 1915, plaintiff gave the defendant a deed with a defeasance clause therein for the amount of "moneys" that he had theretofore borrowed of her with interest thereon. This instrument was in effect on October 24, 1916, when the plaintiff gave the defendant the deed he now asks to have set aside. The plaintiff claims in July, 1916, he went to the house and tendered the amount which he alleges he owed the defendant, \$307.55, and his narrative of the occurrence is that the defendant said: "' You will never see the day you will pay me.' She took the teakettle off of the stove and scalded me, drove me outdoors." That was all the conversation. From the evidence it may be properly found that the premises were worth about \$4,000 in October, 1916. There was a mortgage thereon of \$2,500; adding to which the amount plaintiff conceded he owes defendant, \$307.55, the equity therein was about \$1,200.

The only question of moment is whether the plaintiff executed the deed and separation agreement under duress of imprisonment. The rule of law applicable is stated by Judge COOLEY in *Feller v. Green* (26 Mich. 70, 72) as follows: "To make out the defense of duress of imprisonment, it must appear that the party's action has been influenced by the restraint. If he has only paid, or secured a just debt, while held in custody, the transaction is not to be avoided, unless he did so because of the custody. The question is one of fact, whether he was coerced, or acted willfully; and the conclusion of coercion is not a necessary and unavoidable one from the fact of unlawful restraint."

Under the evidence I cannot find that the plaintiff's arrest and holding for the grand jury, and trial, were for an improper purpose, without just cause or for unlawful purposes. He had reputable and learned attorneys to advise him and I have no doubt whatever they gave him their best judgment and sincere and conscientious advice, and that the plaintiff

acted thereon accordingly of his own free will and not as the result of restraint or coercion. The defendant at the time had an alleged cause of action against the plaintiff for separation which, from what had occurred, was apparently well founded. I believe his conduct toward his wife had been such as to render it unsafe and improper for her to live with him. (See Code Civ. Proc. § 1762 *et seq.*) He owed his wife and child the duty to support them. Under the separation agreement the wife assumed such burdens and the reasonable deduction is that to relieve himself from such obligations he executed the deed and the agreement of separation. Certain evidence given by the plaintiff convinces me that he knew and appreciated fully what he was doing in signing these instruments. During his redirect examination he stated to the court that after the giving of the deed he got back certain personal property from defendant, such as clothing, desk, table, etc., and that he knew at the time he received the articles that it was part of the understanding entered into at the time of signing the papers that she was to turn over these articles. They were delivered to him about a week thereafter, but no attempt was then made to disaffirm the transaction or to deny its legality, which would have been most natural had plaintiff believed such to be the fact. He waited nearly two years before bringing the action. The reason he gives for the delay is "because of my attorney. He was to bring this action two years ago." This is hardly sufficient reason for delay. It was said in *Oregon Pacific R. Co. v. Forrest* (128 N. Y. 83, 93) that "One entitled to repudiate a contract on the ground of duress should, like one who attempts to repudiate a contract on the ground of fraud, act promptly." In *Colen & Co. v. East 189th St. Building & Const. Co.* (141 App. Div. 441, 442) the court said that "it is a fundamental and well-settled rule that one who would repudiate a contract on the ground of fraud and duress must act promptly or he will be deemed to have elected to affirm it."

After a careful consideration of the evidence and especially the plaintiff's, upon which the material part of his cause of action rests, I am satisfied that justice requires the dismissal of the complaint, with costs.

THE FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA,  
Appellant, v. EMANUEL WEINBERG and JULIUS WEINBERG,  
Respondents.

First Department, May 27, 1921.

**Insurance — subrogation of insurer to rights of insured against third person — general release by insured to third person — insurer cannot recover from insured in absence of showing that third person was liable for loss.**

An insurance company cannot recover from the insured the amount it paid to him for damage caused by the leakage of a sprinkler on the ground that the insured had given a general release to the landlord and thereby prevented the insurer from asserting its subrogatory rights against the landlord, where the settlement between the insured and the landlord did not include damages caused by the leakage and there is no proof that the landlord was guilty of any negligence or had breached any contract that it had with the insured.

APPEAL by the plaintiff, The Franklin Fire Insurance Company of Philadelphia, from a determination and order of the Appellate Term of the Supreme Court, First Department, entered in the office of the clerk of the county of New York on the 10th day of March, 1920, reversing a judgment of the Municipal Court, Borough of Manhattan, First District, in favor of the plaintiff, and dismissing the complaint on the merits.

*Alex Davis* of counsel [*David Goldstein* and *Aiken A. Pope* with him on the brief; *Goldstein & Goldstein*, attorneys], for the appellant.

*Samuel Brand* of counsel [*I. Maurice Wormser* with him on the brief; *Samuel Brand*, attorney], for the respondents.

MERRELL, J.:

The action is brought by the Franklin Fire Insurance Company of Philadelphia to recover of the defendants Emanuel Weinberg and Julius Weinberg the sum of \$236.01. The complaint alleges that on or about the 21st day of March, 1917, the plaintiff issued a policy of insurance to the defendants wherein and whereby the plaintiff agreed to indemnify the

defendants from any damage sustained by reason of sprinkler leakage; that thereafter and on or about the 3d of January 1918, the defendants sustained damages as the result of sprinkler leakage, and that the defendants filed proof of loss and plaintiff paid the defendants the aforesaid sum of \$236.01. The complaint then alleges that the policy of insurance provided that upon payment of the loss the plaintiff should be subrogated to the extent of such payment to the defendants' right of recovery against any person for the loss resulting therefrom, and that the defendants after the settlement duly assigned to the plaintiff all such rights of subrogation. The complaint then states that after the aforesaid settlement the defendants made claim against the Metropolitan Life Insurance Company for damages arising out of and connected with the said sprinkler loss, and that after making such claim the Metropolitan Life Insurance Company of New York paid to the defendants the sum of \$394.90, and that in consideration of such payment the defendants released and discharged by an instrument in writing the said Metropolitan Life Insurance Company from any and all claims and demands arising from or connected with the said loss and from any and all claims and demands whatsoever, and that the acts of the defendants in so releasing and discharging the said Metropolitan Life Insurance Company were made without the knowledge or consent of the plaintiff and were in violation of the provisions of the said assignment and in violation of the plaintiff's subrogatory rights, and that by reason of such facts the plaintiff had suffered damages in the sum of \$236.01. Nowhere in the complaint is it alleged that the Metropolitan Life Insurance Company was negligent and that such negligence caused the loss, nor is it stated that the Metropolitan Life Insurance Company had become liable to the defendants for the loss sustained by reason of any breach of contract. Although the opinions in both courts (See 108 Misc. Rep. 500; 110 id. 644) are devoted to consideration of the question of negligence and the question of whether or not the general release prevents a recovery by the plaintiff from the Metropolitan Life Insurance Company, it seems to me that the gravamen of the complaint is based upon the breach of the policy by the defendants in that the defendants, by giving the aforesaid gen-



eral release, have deprived the plaintiff of its subrogatory rights. The Appellate Term has held that the plaintiff has wholly failed to show that the Metropolitan Life Insurance Company was guilty of any negligence or that such company had breached any contract with the defendants which resulted in the sprinkler leakage. In this respect I think that the learned Appellate Term is correct. The case was submitted to the court on an agreed statement of facts substantially in accord with the allegations of the complaint, except that it is not conceded that the defendants are liable to plaintiff in any way or that the general release was given in violation of the plaintiff's subrogatory rights.

It is claimed by the appellant, I think, without justification, that the aforesaid claim made by the defendants against the Metropolitan Life Insurance Company included the claim for loss and damage alleged to have been sustained by the aforesaid sprinkler leakage. In support of such claim the appellant relies upon a letter written by the defendants under date of February 21, 1918, to Messrs. Heil & Stern, the agents of the Metropolitan Life Insurance Company, defendants' landlord. This letter refers at length to conversations and negotiations had between the parties respecting the claim of the defendants for damages resulting from the failure of the Metropolitan Life Insurance Company to properly heat that portion of the leased premises occupied by the defendants. The letter states that it was necessary for the defendants to install radiators; that there had been at least thirteen heatless days when the employees of the defendants could not work or could only work a part of the time, and that inclosed with the letter was the defendants' claim. The letter contained the following statement: "Another loss, for example, due to the cold temperature in our place, was caused by the sprinkler pipe bursting in our dress stock room and flooding the entire floor and part of the 6th floor, and damaging over \$500 worth of our dresses."

It is claimed by the appellant and was held by the Municipal Court that the defendants cannot now be heard to say that the damages caused by the bursting sprinkler was not the result of the negligence of the Metropolitan Life Insurance Company and that without question the general release

covered such damages. It is quite clear to me that in any view of the case the general release did, in fact, cover all claims which the defendants had or might claim to have against the Metropolitan Life Insurance Company, whether such claims were for damages resulting from the lack of heat or from any other cause, and that the Metropolitan Life Insurance Company, so far as the defendants were concerned, was entirely released and discharged from any and all liability. It, therefore, follows that such general release would actually prevent the plaintiff from recovering any sum from the Metropolitan Life Insurance Company upon the theory of subrogation or otherwise. Inclosed with the aforesaid letter of February 21, 1918, was the itemized claim of the defendants against the Metropolitan Life Insurance Company. This claim does not in any way mention any loss or damage claimed to have been suffered by the defendants by reason of the bursting sprinkler pipe. It is, therefore, apparent from the facts stipulated that no part of the money which was paid by the Metropolitan Life Insurance Company did actually cover the claim for damages arising out of the bursting sprinkler. The sum paid by the Metropolitan Life Insurance Company, which was, as aforesaid, \$394.90, is exactly the amount claimed by the defendants to have been paid out by them for installing heaters, as shown by their claim. So that it appears from the stipulated facts that the claim was adjusted on the theory that the Metropolitan Life Insurance Company was liable to pay the defendants their actual expense by reason of the installation of heaters to furnish heat during the period when the Metropolitan Life Insurance Company had failed to heat defendants' premises. Such being the case, there is no fact stipulated which proves or tends to prove, either by way of direct proof or admission, that the damage suffered by the defendants by reason of the leaking sprinkler was caused by the negligence of the Metropolitan Life Insurance Company or by its failure to properly heat the rooms of the defendants. Such being the case, there is not a scintilla of evidence or proof in the record upon which any damages can be predicated. The fact that the defendants did so execute the general release would, I believe, have been a good defense to an action brought by the defendants against the plaintiff under the

policy. (*Bloomingtondale v. Columbia Ins. Co.*, 84 N. Y. Supp. 572.) In other words, if the defendants, having executed the general release in question, had then sued the plaintiff to recover damages for the loss under the policy, the plaintiff might have set up such general release as a defense, for the defendants would not, in such event, have been entitled to recover under the policy which the defendants had themselves breached, for, certainly, the general release would deprive the plaintiff of its right of subrogation to which it was clearly entitled under the provisions of the policy. The plaintiff, however, in this action sought to recover damages, and it was necessary for the plaintiff to show that it had, in fact, sustained substantial damages before it would be entitled to recover. In order to succeed it was necessary for the plaintiff to show that there was some person or corporation liable to pay for the loss sustained, either by reason of negligence or out of some breach of contract. As above noted, the facts do not show that the Metropolitan Life Insurance Company was in any way negligent or that the damage occurred by reason of any breach of contract. The mere fact that the defendants in the letter stated that additional damages had been suffered by reason of the leaking sprinkler is no evidence of negligence on the part of the Metropolitan Life Insurance Company and certainly is no proof that the sprinkler was caused to leak by reason of lack of heat. Moreover, the fact that the defendants did not include such loss in the account contained in this letter shows conclusively that the defendants were not making any claim against the Metropolitan Life Insurance Company for damages sustained by the sprinkler leakage. It, therefore, follows that giving the plaintiff the advantage of all possible inferences, it has failed to show that it could have recovered any damages from the Metropolitan Life Insurance Company had the defendants not executed the general release.

The determination appealed from should be affirmed, with costs.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ.,  
concur.

Determination affirmed, with costs.

MARTIN LEVEY, Respondent, v. JOHN BARTON PAYNE, Director General of Railroads, as Agent under Section 206 of the Transportation Act,\* Appellant, Impleaded with NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY, Defendant.

First Department, May 27, 1921.

**Railroads — action for injuries received at crossing — complaint insufficient that does not allege result of negligence or nature of injury.**

Complaint in an action to recover for injuries received by the plaintiff at or near a railroad crossing does not contain a plain and concise statement of facts sufficient to constitute a cause of action, where it does not allege what happened as the result of the alleged negligence of the defendant, as set forth in the complaint, nor how or in what manner the plaintiff was injured; mere allegations of negligence and that by reason of such negligence the plaintiff was injured are insufficient.

APPEAL by the defendant, John Barton Payne, from that part of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of March, 1921, which denies defendant's motion for judgment on the pleadings on the ground that the complaint did not state a cause of action.

*Elbert N. Oakes* of counsel [*Watts, Oakes & Bright*, attorneys], for the appellant.

*Leonard F. Fish* of counsel [*Jacob M. Friedman*, attorney], for the respondent.

MERRELL, J.:

The action is to recover for personal injuries claimed to have been sustained by the plaintiff on or about July 29, 1919, at or near the Strongtown crossing, so called, in the town of Liberty, Sullivan county, N. Y., solely through the negligence and carelessness of the defendants, their agents and servants, in the management and control of their cars, trains and locomotives upon the defendant railroad. The action was originally brought against Walker D. Hines, Director General

\* See 41 U. S. Stat. at Large, 461, § 206; Pres. Proc. March 11, 1920, and May 14, 1920; 41 U. S. Stat. at Large, 1789; Id. 1794.—[REP.]

of the New York, Ontario and Western Railway Company, and the New York, Ontario and Western Railway Company. The complaint was dismissed against said railroad company on the ground that the defendant Director General was in control thereof, and the said Director General is the sole appellant herein.

It is the contention of the defendant, and upon which ground he insists that the Trial Term erroneously denied his motion for judgment on the pleadings, that the complaint does not state a cause of action because of failure to allege any act or omission causing the injury of which the plaintiff complains.

After the formal allegations concerning the incorporation of the defendant New York, Ontario and Western Railway Company, and that the defendant Walker D. Hines, as Director General, was in the management and supervision of said railway, together with its cars, tracks and appurtenances thereto belonging in the county of Sullivan, State of New York, and particularly in the town of Liberty, in said county, at or near a certain crossing commonly known as the Strongtown crossing, in or near the said town of Liberty, and after alleging that the defendant New York, Ontario and Western Railway Company maintained, operated, controlled and owned said railway, cars, tracks and appurtenances in said county of Sullivan, State of New York, and particularly at the aforesaid Strongtown crossing, with reference to the negligence of the defendant for which plaintiff seeks to recover herein, the plaintiff alleges in the 5th paragraph of his complaint as follows:

"V. That on or about the 29th day of July, 1919, the plaintiff herein was driving his automobile over and along the Liberty Highway, in the direction from Loch Sheldrake, bound for the Town of Monticello, in the County of Sullivan, State of New York, and when the plaintiff came at or near the aforesaid Strongtown Crossing, in the location as hereinbefore more particularly described, he was injured, through no fault on his part, but solely through the negligence and carelessness of the defendants, their agents and servants, in failing to properly manage and control their cars, trains and locomotives; in operating its cars, trains and locomotives at an excessive rate of speed at or near the aforesaid crossing; in

failing to give any proper bells or other sounds of the approach of said cars, trains and locomotives; in failing to have a proper person stationed at the aforesaid crossing to give notice or warning to pedestrians and others who are lawfully thereat; in violating the law of the State of New York appertaining to railroads; in failing to provide a gate at and about the aforesaid crossing; and in failing to use reasonable care, diligence and prudence in the premises."

By the 6th paragraph of the complaint the plaintiff further alleges:

"VI. That solely by reason of the defendant's negligence as aforesaid, plaintiff herein was severely and seriously injured, bruised and wounded, suffered, still suffers, and upon information and belief, will continue to suffer great physical and mental pain, and great bodily injuries, and became sick, sore and disabled, and so remains, and upon information and belief, is permanently injured, and is otherwise injured, and plaintiff was obliged to and necessarily did expend divers sums of money for medicines and medical treatment in an endeavor to cure himself of his said injuries, and upon information and belief, plaintiff will not be able to pursue his vocation with the same efficiency as heretofore."

Plaintiff then alleges that by reason of the aforementioned facts he has sustained injuries in the sum of \$50,000, for which judgment is demanded.

I think plaintiff's complaint is fatally defective in that it nowhere states what happened as the result of the alleged negligence of the defendant, as set forth in the paragraphs of the complaint above quoted, nor does the plaintiff allege how or in what manner he was injured. While the plaintiff alleges that the defendants were negligent in operating cars, trains and locomotives on said railroad at or near the aforesaid crossing at an excessive rate of speed; in failing to give proper signals of the approach of trains, and otherwise, and that by reason of such negligence the plaintiff was injured, the complaint does not state whether such injury was received from a collision or in what manner plaintiff was injured. In short, the complaint does not contain a plain and concise statement of facts constituting plaintiff's cause of action (Code Civ. Proc. § 481), and we are left to conjecture what actually

occurred which resulted in the plaintiff's sustaining the injuries for which he seeks damages. The uncertainty of the nature of the accident, as alleged in the complaint, is increased by the allegation that plaintiff was injured as he came "at or near the aforesaid Strongtown Crossing" by the alleged negligence of the defendants "at or near the aforesaid crossing." The complaint does not state that plaintiff was run into, nor does it state that his injuries were received while crossing the defendants' track. The complaint, to have been intelligible, should have stated these particulars. (*Peterson v. Eighmie*, 175 App. Div. 113; *Pagnillo v. Mack Paving & Construction Co.*, 142 id. 491; *Taite v. Boorum & Pease Co.*, 37 Misc. Rep. 162.)

So much of the order as is appealed from should be reversed, with ten dollars costs and disbursements, and defendant's motion for judgment on the pleadings should be granted, with ten dollars costs, with leave to plaintiff to serve an amended complaint upon the defendant, appellant, on payment of said costs.

CLARKE, P. J., LAUGHLIN, SMITH and PAGE, JJ., concur.

Order, so far as appealed from, reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, with leave to plaintiff to serve amended complaint on defendant, appellant, on payment of said costs.

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FRANK P. CHARLES, as Administrator, etc., of BERNARD CHARLES, Deceased, Respondent, v. WILLIAM M. BARRETT, as President of the ADAMS EXPRESS COMPANY, INC., Appellant, Impleaded with CHARLES STEINHAUSER, Defendant.

First Department, June 3, 1921.

**Motor vehicles — action to recover for death caused by motor truck — express company hiring truck by hour from owner who cared for truck and selected and paid driver not liable — driver not special servant of express company — owner an independent contractor.**

In an action to recover for the death of the plaintiff's intestate who was run over by a motor truck through the negligence of the driver, it appeared that the appellant, an express company, hired the motor truck from its

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First Department, June, 1921.

owner by the hour to cart goods for it from place to place as it directed, but that the owner cared for the truck and selected, employed and controlled the driver, and that the truck was returned to the owner's garage at the close of the day's work, excepting on such days as it was used continuously throughout the twenty-four hours of the day. *Held*, that the driver of the motor truck was not in the employ of the appellant at the time of the accident and, therefore, the appellant was not liable. Nor can it be said that the driver, a servant in the general employ of the owner of the truck, was, at the time of the accident, a special servant of the appellant, so as to make the latter liable for his negligence. The owner of the truck was an independent contractor.

APPEAL by the defendant, William M. Barrett, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 15th day of November, 1920, upon the verdict of a jury for \$2,000, and also from an order entered in said clerk's office on the 22d day of November, 1920, denying said defendant's motion for a new trial made upon the minutes.

*Alfred W. Meldon* of counsel [*Joseph Force Crater* with him on the brief], for the appellant.

*Thomas J. O'Neill* of counsel [*Leonard F. Fish* with him on the brief], for the respondent.

MERRELL, J.:

Plaintiff's intestate came to his death on November 7, 1917, on East Twenty-fourth street, in the borough of Manhattan, New York city, as the result of being run over by a three and one-half ton Mack truck, the property of one Charles Steinhauser, and which was being driven at the time by the chauffeur of said Steinhauser, but while said truck was engaged in carrying express for the defendant Adams Express Company, Inc. In the complaint it was alleged that the death of plaintiff's intestate was caused by the negligence of the chauffeur in charge of said truck and at the time of the accident alleged in the complaint to be under the control and command of both of said defendants. Plaintiff's intestate at the time was employed by the department of highways of the city of New York, and was engaged as a laborer in making repairs to the highway at a point a short distance westerly of Avenue



A. The evidence shows that the motor truck in question was driven into Twenty-fourth street, and that the chauffeur lost control of the same and, although he endeavored to escape being struck, plaintiff's intestate was run over by the truck, which continued on its uncontrolled career upon the sidewalk, colliding with the buildings upon the street.

The action was originally brought against both Steinhauser and the appellant Adams Express Company, Inc., a voluntary joint stock association consisting of more than seven members, of which William M. Barrett was its president. During the progress of the trial the court granted a nonsuit as to the defendant Steinhauser, and the question of the negligence of the defendant Adams Express Company, Inc., causing the death of plaintiff's intestate was submitted to the jury. The jury returned a verdict in favor of the plaintiff and against the said express company for \$2,000 damages, upon which the judgment appealed from was entered. The defendant moved to set aside the verdict and for a new trial upon the usual grounds, which motion was denied, and said defendant has also appealed from the order denying its motion to set aside said verdict and for a new trial.

The first and important question presented upon this appeal is as to whether the defendant was the party responsible for the negligence of the chauffeur, who managed and controlled the truck at the time plaintiff's intestate was killed. Upon the question of the negligence of the chauffeur, the verdict of the jury seems to be amply supported by the evidence. Upon the question as to whether or not the defendant, appellant, is to be held responsible for the negligence of the driver of the car, the evidence very clearly shows that the truck in question was owned at the time by the defendant Steinhauser. At the time of the accident the truck was being used for the purpose of transportation of goods for the defendant express company under a contract between Steinhauser and said company whereby the latter hired of Steinhauser the use of his truck and chauffeur at and for a consideration of two dollars per hour. Steinhauser hired the chauffeur, paid him his wages, and, so far as the evidence shows, remained always his master. Steinhauser paid the expenses of operating the truck, furnished the gasoline used in running it, attended

to the repairs, and furnished the chauffeur to drive it. At the time of the accident there was printed upon the truck, which was a closed van, the name, "Charles Steinhauser, of 211 and 213 East 4th St." Suspended from the rear of the driver's seat on the grating was a card reading, "Adams Express Co." Steinhauser, called by the plaintiff, testified that he owned the truck and hired the driver, one Moses, and paid the driver's salary. Steinhauser testified that he had an arrangement for the truck with the defendant Adams Express Company, Inc.; that he made this arrangement with a Mr. Peterson, who was manager of the transportation department of the defendant, appellant; that the agreement between Steinhauser and the defendant, represented by its manager of transportation, Peterson, was verbal, and was made in September, 1917. Steinhauser testified that under the arrangement he was to furnish the truck and chauffeur to the Adams Express Company, Inc., to work for them and was to receive two dollars an hour pay for it. He testified that having acquired the truck, he came to Peterson and asked for work for his car, and that Peterson said he could send the car down to work and the price was to be two dollars per hour for the truck and chauffeur, and that pursuant thereto the owner of the car sent the same down to the defendant. Steinhauser testified that under his arrangement with Peterson he was to call up the main office of the defendant, and that from there he would receive directions where to send the car every morning, unless the car worked all of the twenty-four hours; that sometimes the car did work twenty-four hours, when the owner, Steinhauser, supplied another chauffeur, the car being operated in two twelve-hour shifts. Steinhauser testified that having received directions from the main express office where his car was to be sent, he had no further control over it during the day, but that the car was from then on subject to the directions of the express company. On cross-examination Steinhauser testified that when he went to see Peterson he told him that he would like to cart the goods of the Adams Express Company, Inc., if he could get the work, and that he had a car; that he had not previously worked for the express company, nor had he theretofore carted any goods for it. Steinhauser testified that he called up the defendant express

company every morning for directions as to where his truck was to be sent. The truck after the close of the day's work was each day returned to the garage of the owner, Steinhauser, excepting on such days as the truck was used continuously throughout the twenty-four hours of the day. Steinhauser also testified that the truck was a van, eleven feet high from the ground, and about twenty-four feet long, and seven feet six inches in width; that it was closed and locked, and that when in use the express company kept the key of the lock and was accustomed also to seal the truck when transporting its goods; that a time card was kept by the express company, and as the truck went from one station to another in transporting express company goods the time card was stamped by the employees of the express company at the various stations, so that a record was kept of the hours of actual service for which the express company was required to pay.

Moses, the driver of the car, testified that at the time of the accident it was transporting goods for the express company; that he was at all times employed by the owner of the car, Steinhauser, and received his pay from him; that there was also employed in driving the car, when its services were required for the full twenty-four hours continuously, another chauffeur by the name of Simkowitz, who was a brother-in-law of the owner of the car. Moses further testified that on the day of the accident he took the truck out from the garage and proceeded to the office of his employer, Steinhauser, and from there proceeded to the express company, where instructions were given him that he would get a load at Park Place to take to Long Island.

Peterson, the superintendent of transportation for the defendant express company, testified that he made the arrangements with Steinhauser for the rental of the truck; that Steinhauser called upon him and told him that "he had purchased this van and wanted to haul goods for the Adams Express Company," and that he, Peterson, told Steinhauser he could "cart these goods" for the defendant, and fixed the price for such cartage at two dollars per hour. Peterson agrees with Steinhauser that he informed the latter each day where to send the truck, and that in consideration of the

payment of two dollars per hour the defendant "expected a certain amount of goods to be delivered."

At the close of the evidence counsel for the defendant, appellant, moved to dismiss the complaint upon the ground that the plaintiff had failed to establish that the driver of the truck was the servant of the express company at the time of the accident. This motion was denied, and the case was submitted to the jury as against said defendant. It seems to me that the court clearly erred in refusing to grant the defendant's motion for the dismissal of the complaint. I think it clearly appears from the evidence that at the time of the accident, Moses, the driver of the car, was in the employ of the defendant Steinhauser and was engaged at the time in Steinhauser's business. Steinhauser, in consideration of the payment to him of two dollars an hour, had agreed to furnish the truck in question and to equip and operate and drive the same in transporting the defendant's goods. There is practically no dispute in the evidence as to just what the arrangement was between the owner of the car and the express company. The chauffeurs who drove the car were both selected, employed and paid for their services by Steinhauser. Steinhauser had purchased the truck for the purposes of his business, which was general trucking. There is no evidence that either driver of the truck had ever done any work for the express company prior to the arrangement between it and Steinhauser. All of these arrangements with reference to the transportation of the defendant's goods were made between Steinhauser and the company. The company had no voice or interest whatever in the selection of the drivers of the car. It had no authority to engage such drivers nor to discharge them. The entire expense for gasoline and the operation of the car fell upon Steinhauser, and at the close of each engagement in trucking defendant's goods, the car was returned to Steinhauser's garage. Each day Steinhauser applied to the defendant for instructions where he was to send his truck, and having been informed where its services would be required, he directed the chauffeur in charge of the car to proceed to the point designated. The only relationship between the defendant and the chauffeur was that when the car appeared ready for business the agents

of the defendant directed it where to go to get and to transport the defendant's goods. Under such circumstances, there can be no doubt but what the driver of the car, Moses, at the time of the accident, was the servant of Steinhauser, and that the defendant was not liable for the negligence of said driver. At the time of the accident the driver was upon the business of his employer, Steinhauser, engaged in earning the two dollars an hour which the company agreed to pay Steinhauser for the transportation of its goods by means of his truck. No claim was made upon the trial nor upon this appeal that the defendant had any voice in the selection of the chauffeur, and it was powerless to discharge him. Under such circumstances it cannot be reasonably claimed that Moses was the servant of the express company at the time of the accident. Nor can it be said that Moses, a servant in the general employ of Steinhauser, was at the time a special servant of the express company, and that the latter is to be held liable for his negligence. In *Maxmilian v. Mayor* (62 N. Y. 160) it was said: "This rule of *respondeat superior* is based upon the right which the employer has to select his servants, to discharge them if not competent, or skillful or well behaved, and to direct and control them while in his employ. (*Kelly v. The Mayor*, 11 N. Y. 432.) The rule has no application to a case in which this power does not exist. (*Blake v. Ferris*, 5 N. Y. 48.) It results from the rule being thus based, that there can be but one superior at the same time and in relation to the same transaction."

The rule as to when a hirer can be said to have control of the servant is stated in *Shearman & Redfield on Negligence* (Vol. 1 [6th ed.], § 162) as follows: "The hirer cannot properly be said to have control of the servants, unless he has the right to discharge them and employ others in their places in case of their misconduct or incompetency; that being the only practicable means by which free servants can be controlled. If, therefore, the hirer has no such power, he is not responsible to anyone for the faults of the servants."

Nothing appears in the contract between Steinhauser and Peterson, representing the defendant company, giving to the defendant any control over the driver of the truck, and, so far as the evidence discloses, the relationship of the parties

as it originally existed at the time the arrangement was made was at no time changed during the course of defendant's hiring of the truck to transport its goods. The owner of the car, Steinhauser, was an independent contractor and undertook to transport goods for the defendant in consideration of the payment of two dollars an hour for the use of his car in such transportation. As between the express company and Steinhauser the contract was purely one of service. Moses, the driver of the car, was merely carrying out the arrangement made by his employer, Steinhauser, with the defendant. The case of *McNamara v. Leipzig* (227 N. Y. 291) seems to be a controlling authority upon the facts in the case at bar. In that case the court said: "The performance of the agreement had been entered upon and was being carried out at the time of the accident. In the performance the defendant exercised no control in the selection of the chauffeur, or over him, his wages or the car, other than to direct him when and where to come with the car for the defendant and where to transport him. The car when not in the use of the defendant was kept in the garage of the company, was there cared for and supplied with the necessities by the company, and there the chauffeur received calls of the defendant for the use of the car and the chauffeur. In the matters of coming to and leaving the defendant and of taking him to the places directed by him the chauffeur was under his directions."

The court held that the defendant in that case was not liable, but that the garage company was responsible for the negligence of its chauffeur. The court further said: "The relation of principal and agent obviously did not exist. The liability of the defendant depends on the doctrine of the liability of a master for the acts of his servant done in the course of his employment. The relation of master and servant is created by contract, express or implied. Of the elements which may constitute it, those that the servant must, in the course of the employment, be doing the work of the master under the will, direction and control of the master throughout all the details of the work, are essential. \* \* \* A servant lent or let by his master to another does not become the servant of the other because the other directs what work is to be done, or in what way it is to be done. If the

servant remains subject to the general orders of the person who hires and pays him he is still his servant, although specific directions may be given him by the other from time to time as to the work to be done. The other person has the right to exercise the degree of control of the servant essential to secure the fulfillment of the agreement between the master and himself."

In *Hartell v. Simonson & Son Co.* (218 N. Y. 345) the Court of Appeals, at page 349, said: "A servant in the general employment of one person, who is temporarily loaned to another person to do the latter's work, becomes, for the time being, the servant of the borrower, who is liable for his negligence. *But if the general employer enters into a contract to do the work of another, as an independent contractor, his servants do not become the servants of the person with whom he thus contracts, and the latter is not liable for their negligence.*" (Italics are the writer's.)

In conclusion, the Court of Appeals said, in *McNamara v. Leipzig (supra)*: "In the present case the written agreement defines the relation and liabilities of the parties. It gave for a consideration to the defendant the use, at demand, of the automobile and a chauffeur to operate and run it for a certain period. The company possessed, managed, cared for and supplied the automobile and selected, employed and controlled the chauffeur who operated the car for it. The extent of the defendant's control was to direct the chauffeur when and where to come with the automobile, where to go and where to stop. In obeying those directions the chauffeur was carrying out the company's work under the agreement. The defendant had no authority, management or care over the automobile or as to the manner in which it should be treated or driven. The chauffeur did the company's business in his own way and the orders given him by the defendant merely stated to him the work which the company had arranged to do."

The above language seems to me to be pertinent to the conceded facts in the case at bar. Here we have the renting of the use of the truck by Steinhauser to the defendant Adams Express Company. For a consideration of two dollars an hour the express company was to have the use when it wished of the truck and a chauffeur to drive it. Steinhauser, the

owner, owned, managed, cared for and supplied the truck, and selected, employed and controlled the driver who operated it. The only control of the defendant was to direct where the truck was to go and when in the performance of the contract which it had with the owner. In following the defendant's instructions the driver of the car was merely performing the work of his employer under his arrangement with the defendant.

That the driver, Moses, was at the time of the accident in the employ of Steinhäuser and not of the defendant, appellant, is, I think, sustained by the decisions in *Kellogg v. Church Charity Foundation* (203 N. Y. 191); *Driscoll v. Towle* (181 Mass. 416); *Baker v. Allen & Arnink Auto Renting Co.* (231 N. Y. 8), and *Weaver v. Jackson* (153 App. Div. 661), and many other decisions holding that under the circumstances existing in the case at bar the owner of the car and not the hirer is responsible for the negligence of his servant, the driver.

The respondent relies upon the decision of this court in *Braxton v. Mendelson* (190 App. Div. 278). That case is clearly distinguishable from the case at bar. In the *Braxton* case the defendant, the owner of the truck, had leased it with others under a yearly contract with a dairy company to furnish trucks to work by the day for such company; the company had full charge of the trucks; the truck in question was kept at the hirer's plant and was taken out every evening and returned to the same place every night, and was at all times exclusively in the control and possession of the hirer, save only when repairs were required upon it, when it was temporarily returned to the owner; the driver of the car was assigned to the hirer's organization, and it was necessary for him to become a member of the Milk Drivers' Union in order to drive the car for the hirer; the chauffeur received his orders solely from the hirer, and had no dealings with his original employer, aside from receiving his wages and authority with reference to repairs upon the car; whereas, in the case at bar, the driver of the truck remained under the control at all times of the owner of the car, from whom he received directions each day where, in the performance of the owner's contract with the express company, he was to proceed for work; each day the car was returned to the owner's garage, and



each morning the driver obtained his directions directly from the owner as to where his services were required. While, as before stated, in carrying out his master's contract with the express company, he received directions from the express company from time to time during the day, where they desired their goods to be taken, such directions in no manner involved the services of the driver to the express company, but were merely to direct where the express company's goods were to be taken pursuant to its contract with the owner of the car.

I am, therefore, of the opinion that at the time of the accident the defendant, appellant, was not responsible for the negligence of the driver of the car, and that, therefore, the said defendant's motion for dismissal of the complaint should have been granted.

If this be so, there is no necessity for considering the other grounds upon which the defendant asks for a reversal of the judgment, namely, as to whether plaintiff's intestate left dependent relatives who were entitled to the compensation awarded by the verdict of the jury for the death of the intestate.

The judgment and order appealed from should be reversed, with costs, and plaintiff's complaint dismissed, with costs.

CLARKE, P. J., LAUGHLIN, SMITH and PAGE, JJ., concur.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

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ARNOLD C. HANSEN, Appellant, v. GRIGORI BENENSON,  
Respondent.

First Department, June 3, 1921.

**Depositions — examination of plaintiff before trial — examination denied where plaintiff bound to prove all matters on which defendant can examine — examination denied as to counterclaim where issue not joined thereon.**

In an action to recover upon a *quantum meruit* a balance alleged to be due for personal services claimed to have been performed by the plaintiff for the defendant, in which the defendant interposed a counterclaim to which the plaintiff demurred, an application by the defendant before the demurrer to the counterclaim was disposed of and issue joined thereon

for an examination of the plaintiff is premature, since the plaintiff must prove all the matters upon which the defendant can examine him under the pleadings as they stand and he has no right to examine the plaintiff concerning the counterclaim since the issues with reference thereto have not been fixed.

APPEAL by the plaintiff, Arnold C. Hansen, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 16th day of March, 1921, denying plaintiff's motion to vacate an order for his examination before trial.

*Isadore Shapiro* of counsel [*Frank M. Swacker*, attorney], for the appellant.

*Abraham Tulin*, for the respondent.

MERRELL, J.:

The action is to recover upon a *quantum meruit* a balance of \$112,990.77 for personal services claimed to have been performed by the plaintiff for the defendant. It is claimed in the complaint that the defendant, a subject of Russia and residing in England, owned 21,000 ounces of platinum in Vladivostok, Russia, which the defendant desired and planned to sell in the United States; that at the special instance of the defendant the plaintiff took charge of and arranged for the insurance and transportation of said platinum from Vladivostok, Russia, to New York city, and that the plaintiff thereafter disposed of the same for and at the request of the defendant to the United States government for an aggregate sum of \$2,013,261.40; that plaintiff's services in relation thereto continued from September 29, 1917, to July 25, 1919, when the plaintiff accounted fully to the defendant. The complaint further alleges that the defendant accepted the plaintiff's labor and services and was greatly benefited thereby and profited by reason thereof to the amount of about \$500,000; that by reason of the foregoing plaintiff alleges his services were worth \$120,795.68, no part of which has been paid, except a credit of \$7,804.91.

The answer denies the material allegations of the complaint, and alleges by way of separate defense that the plaintiff was at all times mentioned in the complaint the agent in New York of the Russian and English Bank, a Russian

banking corporation, and also of G. Benenson & Company, Ltd., a British corporation, and that whatever services he rendered in connection with said platinum were rendered, not for the defendant personally, but for said bank and said corporation, and that he had been fully paid therefor prior to the commencement of the action. By way of counterclaim the defendant alleges that the plaintiff obtained various and sundry sums of money, aggregating \$43,058.26, from said Russian and English Bank and said British corporation to pay his expenses as New York agent for them, and that plaintiff converted said moneys to his own use and has retained the same unlawfully, and has never accounted therefor, and that the defendant has received by assignment from said bank and said British corporation all their rights, title and interest to said moneys. Judgment is prayed for upon said counterclaim in the amount thus alleged to have been received by said plaintiff.

Issue has never been joined upon the counterclaim, but a demurrer thereto was interposed on March 1, 1921, which has not been as yet disposed of.

It seems to me clear that the defendant's application for an examination of the plaintiff is entirely premature. So far as I am able to discover the plaintiff must prove all of the matters upon which the defendant can examine him in the present state of the pleadings. The action is not yet at issue as to the defendant's counterclaim, and, therefore, the examination of the plaintiff with reference thereto is premature. As the pleadings stand, there is no issue of fact to be tried with reference to said counterclaim. No necessity for an examination of the plaintiff appears except to enable the defendant to prove his counterclaim, and the issues with reference thereto have not as yet been fixed. (*Sprague v. Currie*, 129 App. Div. 365; *Frear v. Duryea*, 151 id. 687, 690.)

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion granted.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ.,  
concur.

Order reversed, with ten dollars costs and disbursements, and motion granted.

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First Department, July, 1921.

In the Matter of the Transfer Tax on the Estate of LOUISE S. CANDA, Deceased.

PHILIP DEXTER and BENJAMIN L. YOUNG, as Executors, etc., of LOUISE S. CANDA, Deceased, Appellants; THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

First Department, July 8, 1921.

**Taxation — transfer tax — when exercise of power of appointment taxable — transfer under powers of appointment by resident of this State not taxable where donors were residents of adjoining State where property was situated and will was probated.**

While upon principle an inheritance tax is not one upon property but is rather one upon the succession of property, the State has also the right to levy a tax upon the exercise of a power of appointment in any case wherein such power is executed by virtue of the authority granted by the State whenever such authority or privilege is necessary to pass the title of the property to the beneficiary.

But the exercise by a testatrix, a resident of this State, of two powers of appointment is not subject to a transfer tax under subdivision 6 of section 220 of the Tax Law, where it appears that the donors of the powers of appointment were both residents of the State of Massachusetts, that all of the property to which the powers relate is situated in the State of Massachusetts, and that the will of the testatrix has been there probated and has not been offered for probate in this State, for it is not apparent that the exercise of the powers or the validity of the will is in any respect dependent upon the laws of this State or upon any authority or privilege granted or extended by said laws to the testatrix.

APPEAL by Philip Dexter and another from so much of an order of the Surrogate's Court of the county of New York, entered in the office of said surrogate on the 31st day of January, 1921, as affirms in part a prior order assessing the transfer tax and confirming the appraiser's report.

*Francis Smyth* of counsel [*Edgar W. Freeman* with him on the brief; *Cadwalader, Wickersham & Taft*, attorneys], for the appellants.

*Schuyler C. Carlton* of counsel [*Lafayette B. Gleason*, attorney], for the respondent.

MERRELL, J.:

This is an appeal by the executors of Louise S. Canda, deceased, from an order of the Surrogate's Court of the county

of New York which, so far as appealed from, denied certain appeals of said executors from an order theretofore made fixing and assessing a transfer tax upon decedent's estate.

Three questions are raised by the appellants, which are as follows:

*First.* The taxability of the exercise by the testatrix, Louise S. Canda, a resident of the State of New York, of two powers of appointment, one under the will of her grandfather, Benjamin Sewall, and the other under the will of her father, Charles T. Hubbard. Both of said testators were residents of the State of Massachusetts, and the property appointed was at all times and now is located in Massachusetts.

*Second.* The taxability at this time of certain remainders created by the will of said Louise S. Canda, deceased, respecting said appointed property, which remainders are subject to be defeated by the exercise of absolute and general powers of appointment conferred upon the beneficiaries of the precedent trust estates.

*Third.* The deductability of the Federal estate tax from the assets taxable in this proceeding.

The last question was not argued, but is presented by the appellants for the purpose of preserving their rights in case they desire to raise the question as a Federal one, such claim having been determined adversely to the contention of the appellants by the Court of Appeals in *Matter of Sherman* (222 N. Y. 540) and *Matter of Bierstadt* (178 App. Div. 836).

Louise S. Canda, the testatrix, married one Ferdinand E. Canda, and became a resident of the State of New York. She died on April 18, 1919, leaving a last will and testament, which was apparently executed in the State of New York, but which has been probated in the State of Massachusetts. No application has been made to prove decedent's last will and testament within the State of New York. The testatrix was the donee of the said two powers of appointment, which powers she exercised in and by her said last will and testament. The first power arose under the will of her grandfather, Benjamin Sewall, who died in 1879, a resident of the State of Massachusetts. The second power arose under the last will and testament of decedent's father, Charles T. Hubbard, who died in 1887, and who was also a resident of the State of

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First Department, July, 1921.

Massachusetts. Under the aforesaid wills of Benjamin Sewall and Charles T. Hubbard, intervening trusts were created, and the trustees were all residents of the State of Massachusetts, where both wills were proven. The securities constituting the aforesaid trusts were and now are physically held in the State of Massachusetts and were there at the time of the death of Louise S. Canda. At the time of her death the testatrix left certain personal property at her residence in the city of New York, which, with other personalty, was of the value of \$85,121.43, of which, after the deduction of certain expenses, there remained a net estate of \$64,829.13. By her will she gave to her daughter, among other things, a half interest in a pearl necklace worth \$20,000, and to her son she bequeathed the other half of said pearl necklace and made to him other specific bequests. The residue of her individual estate, amounting to \$26,004.63, she bequeathed to her husband. No question is raised upon this appeal respecting the taxability of decedent's individual estate.

The appraiser has fixed the value of the aforesaid powers of appointment at the sum of \$451,474.13. So far as material to this appeal, decedent exercised her two powers of appointment by designating trustees in the State of Massachusetts with direction to hold such trust property and to pay and divide the net income equally between her son and daughter during their respective lives. Her will then provided as follows: " \* \* \* and upon the death of either of them, whether before or after my death, to pay over, transfer and convey one-half of the principal of the trust fund as then existing in the proportions and to the persons and uses that the one so dying shall by his or her last will direct and appoint, and in default of such appointment in equal shares to his or her children and the issue of any deceased child, such issue to take the parent's share by representation, and in default of such children and issue to those persons who would have taken the same if my child so dying had died seized and possessed thereof in his or her own right and had died intestate and domiciled in said Commonwealth of Massachusetts. And thereafter to continue to hold the remaining half of said trust fund and to pay the net income thereof, as often as semi-annually, to the survivor of my said two children,

and upon his or her death to convey, transfer and pay over the principal of the trust fund, as then existing, in the proportions and to the persons and uses that the one so dying shall by his or her last will direct and appoint, and in default of such appointment in equal shares to his or her children, the issue of any deceased child, such issue to take the parent's share by representation, and in default of such children and issue to those persons who would have taken the same if my child so dying had died seized and possessed of the same in his or her own right and had died intestate and domiciled in said Commonwealth of Massachusetts."

The surrogate has held that the life estates bequeathed to testator's two children are not taxable for the reason that the transfer to them to such extent is part of what they would have received under the wills of their ancestors if Louise S. Canda had not exercised the powers conferred upon her. Decedent's two children claim the right to elect to take under the wills of the donors of the powers, and, therefore, render their life estates in the trust immune from taxation. The surrogate's determination in this respect seems to be upheld by the authorities (*Matter of Lansing*, 182 N. Y. 238; *Matter of Slosson*, 216 id. 79) and is not questioned on this appeal.

Upon the first question above set forth and presented upon this appeal the surrogate has held (114 Misc. Rep. 161) that as the decedent was a resident of this State at the time of her death and has made a will exercising the aforesaid powers of appointment, the remainders over are assessable under subdivision 6 of section 220 of the Tax Law, and that such remainders are presently assessable at their highest ascertainable value. So far as material, subdivision 6 of section 220 of the Tax Law, under which subdivision property passing under a power of appointment is taxable, if at all, reads as follows:

"6. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

The subdivision as above quoted was enacted in 1911. Prior to such enactment and in 1897 the first statute of the State of New York was passed which enabled the State to tax the exercise of a power of appointment. Until 1909 the provision was contained in subdivision 5 of section 220 of the Tax Law, but in 1909 it became subdivision 6 of such section. The statute of 1897 and the statutes prior to 1911 are in substance the same as the statute of 1911, except that they contained other provisions respecting the taxation of property passing on the failure to exercise a power of appointment. (See Tax Law [Gen. Laws, chap. 24; Laws of 1896, chap. 908], § 220, as amd. by Laws of 1897, chap. 284; Laws of 1905, chap. 368, and Laws of 1908, chap. 310; Tax Law [Consol. Laws, chap. 60; Laws of 1909, chap. 62], § 220, as amd. by Laws of 1910, chap. 706; Laws of 1911, chap. 732; Laws of 1915, chap. 664, and Laws of 1916, chap. 323; since amd. by Laws of 1919, chap. 626.)

It is claimed by the appellants that as the donors of the aforesaid powers of appointment were both residents of the State of Massachusetts and that as all of the property to which the powers of appointment relate is situate in the State of Massachusetts and decedent's will has been there probated, and not here, the State of New York has no control over the transfer which the State now claims the right to tax. On the other hand, it is asserted by the respondent, and the surrogate has held, that as decedent's will was executed in New York and decedent was a resident here, the beneficiaries under her will came into possession of the aforesaid appointed property through the exercise of a power or privilege conferred upon the testatrix by this State, and that for such reason the surrogate has jurisdiction to assess the tax on the exercise of such power.

In order to determine whether or not the aforesaid remainders are taxable, it is necessary to ascertain whether the beneficiaries under the will of Louise S. Canda actually came into possession of the appointed property by virtue of the laws of the State of New York and by reason of a privilege conferred by this State which enables the beneficiaries to take. It must be conceded that the property in question formed no part of the estate of Louise S. Canda. (*United States v.*



*Field*, 41 Sup. Ct. Rep. 256; *Matter of New York Life Ins. & Trust Co.*, 139 N. Y. Supp. 695.) The testatrix did not even enjoy an absolute power of appointment which could have been exercised by her during her life in such a manner as to vest in her an absolute fee. Such interest of the decedent could not, therefore, have been reached by her creditors, either in equity or otherwise. Except for the purpose of taxation under the aforesaid section of the Tax Law of the State of New York, the beneficiaries under the will of Louise S. Canda, deceased, cannot be claimed to take otherwise than under the wills of the respective donors of the powers.

As the respondent contends that the right of Louise S. Canda to exercise said powers of appointment is a privilege conferred by the laws of the State of New York, where the decedent was domiciled, it is thought best to review briefly the authorities relating to the exercise of powers of appointment by a donee living in a jurisdiction other than that in which the donor resided at the time of his death. In *Matter of New York Life Ins. & Trust Co.* (139 N. Y. Supp. 695) the surrogate reviewed at considerable length the development of the law respecting the exercise of such powers of appointment and after considering both the English and American decisions, he concludes: "It will be perceived that in respect of powers of testamentary appointment over settled property in England or America the law of the domicile of the donor of the power, and not that of the donee of the power, determines in most cases whether or not there was a sufficient testamentary execution of the power of appointment given to the donee of the power."

The general rule respecting the passing of an estate under a power of appointment was well stated by Chancellor KENT in 4 Kent's Commentaries, 337, as follows: "An estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power. The party who takes under the execution of the power, takes under the authority, and under the grantor of the power, whether it applies to real or personal property, in like manner as if the power, and the instrument executing the power, had been incorporated in one instrument."

The above rule is stated and reiterated in *Matter of Harbeck*

(161 N. Y. 218), and seems to have been adopted by the courts of other States of the Union where the question has been authoritatively determined. In *Sewall v. Wilmer* (132 Mass. 131) it was held: "But the property of which Mrs. Wilmer has a power of appointment is not her property, but the property of her father; and the instrument executed by her takes effect, not as a disposition of her own property, but as an appointment of property of her father under the power conferred upon her by his will."

In England such has been the rule since 1838 when the case of *Tatnall v. Hankey* (2 Moo. P. C. 342) was decided by the English Privy Council. In the *Tatnall* case it was determined that the English Court of Probate had jurisdiction to examine into the execution of the power of testamentary appointment executed outside of the kingdom for the purpose of determining whether the instrument whereby it was exercised in fact and in law made testamentary disposition of the property included within the power of appointment. The will in question was executed in Paris and was not in accord with the laws of England, but was ultimately proved in England and accepted by the English Probate Court for the purpose of establishing the due exercise of the power of appointment by the donee. Again, in 1909, the English House of Lords, in *Murphy v. Deichler* (A. C. 446) confirmed the rule laid down in *Tatnall v. Hankey* (*supra*) and held that a power of appointment by will over Irish property was properly exercised by a will of the donee executed in English and Irish form, although the testator was domiciled in Germany and the will was not executed according to the law of the domicile of the appointor.

In *Bingham's Appeal* (64 Penn. St. 345) the facts were as follows: William Bingham, the donor of the power, was domiciled in Pennsylvania, where his will was proven in 1856. In his will he created a trust, the income therefrom to be paid to his son Alexander with a power of appointment to his said son by his last will and testament. The son, Alexander Bingham, died in England in 1865, that country being then his domicile, leaving a will. The court held: "Whether a power contained in a Pennsylvania will over Pennsylvania property has been duly executed, is evidently a question of Pennsylvania law, and not that of a foreign country \* \* \*."

The will, the property, and the domicile of William Bingham being within Pennsylvania, the law of this State must govern the interpretation both of the power and the execution of it."

Similar rules were laid down in the following cases: *Cotting v. DeSartiges* (17 R. I. 668); *Lane v. Lane* (4 Pennewill [Del.], 368); *Prince de Bearn v. Winans* (111 Md. 434).

In a very similar case to the one at bar the Supreme Court of Massachusetts in *Walker v. Treasurer & Receiver General* (221 Mass. 600) held as follows: "It follows that no privilege by which the property passes, whether by exercise of the power or by failure to exercise it, is conferred by the law of this Commonwealth. Hence no commodity exists here on which the tax can be levied. By resort to the courts of Maryland all questions as to the succession of this trust estate will be determined without invoking the law of Massachusetts. That will be settled without dependence upon the moral support or actual assistance of our laws. The circumstance that the will has been set up in this Commonwealth is not of controlling significance. There is nothing in this Commonwealth upon which St. 1909, c. 527, Sec. 8 can operate."

In the case at bar the existence of the power did not of itself vest any estate in the donee, and no part of the aforesaid property which was subject to the power of appointment vested in the testatrix, nor could it be distributed as a part of her estate. (*United States v. Field*, 255 U. S. 257; 41 Sup. Ct. Rep. 256.)

In *Matter of Harbeck* (161 N. Y. 211) it was held that a bequest in the exercise of a power of appointment by will was not taxable under the Transfer Tax Act of the State of New York as it then existed. The will in question was made by John H. Harbeck, who died in February, 1878. The testator bequeathed the sum of \$300,000 in trust, the income thereof to be paid to his wife during her life and after her death the principal to such persons as she should appoint by her last will and testament. Decedent's wife made a will dated October 20, 1887, which was admitted to probate in February, 1896. The State of New York attempted to assess the transfer through the exercise of the aforesaid power of appointment under our then existing Transfer Tax Law. The court held that the law as it then existed was not suffi-

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ciently broad to enable the taxation of property passing under a power of appointment. The opinion was written by Chief Judge PARKER, and clearly shows that the Court of Appeals was then of the opinion that the property passed to the beneficiaries under and by virtue of the will of the original donor and not through the exercise of the power of appointment by the donee. Chief Judge PARKER says, in part:

"In the past, however, there have been a few cases in which the courts have been called upon to decide that while the instrument by which the power is said to be executed becomes incorporated into and forms a part of the original instrument creating the power, yet it takes effect as of the date of the execution of the power, and these cases have been laid hold of to make the final step in the transfer of the property from the testator Harbeck to the beneficiaries operate as the dominating one; the act of the appointor, instead of that of the testator, being treated as the one by which the fund is transmitted to them. In other words, notwithstanding the general rule by which a paper constituting an execution of the power of appointment becomes incorporated into the original instrument creating the power (so that the latter is given the same effect as if the names of the appointees were originally written into the instrument creating the power), it is said that the date of the original instrument is to be ignored, and that upon which the power of appointment is exercised substituted fully in its stead. \* \* \* But long after the decisions in the cases relied upon by the learned judge who wrote for the Appellate Division \* \* \* this court had that question before it in *Genet v. Hunt* (113 N. Y. 158) \* \* \*. The court held that the trusts under the will should be regarded as having been created at the date of the trust deed, and that they were, therefore, invalid. \* \* \* 'An estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power.'"

Since the Tax Law was amended in the respects hereinbefore stated, there have been decisions thereunder in which it has been held that while the beneficiaries under the will of a donee of a power of appointment technically take under the instrument creating the power, yet as the possession of the

property actually passes through and by means of the will of the donee, the bequests to such beneficiaries are taxable. In *Matter of Hull* (111 App. Div. 322; *affd.*, 186 N. Y. 586) it was held that the taxability of property does not depend merely upon the location of such property, but upon whether the beneficiary came into possession of it through the exercise of a privilege conferred by the State of New York, and that when the donee of a power of appointment who is a resident of this State has received such power from a donor who was also a resident of this State, the property is subject to an inheritance tax upon the exercise of the power of appointment by the donee, although the property itself is situated without the State of New York. The Court of Appeals affirmed the decision of the Appellate Division in the above case upon the opinion of Mr. Justice WOODWARD. In his opinion Mr. Justice WOODWARD said, in part: "The question is not where the property was located, or whether it was real estate or personal property, but whether the beneficiary came into its possession through the exercise of a privilege conferred by the State of New York."

The learned justice then quotes the portion of section 220 of the Tax Law above referred to, and says: "If the subject of the taxation, whether that be property of a tangible nature or a privilege conferred by the State, is within the jurisdiction or dominion of the Legislature, then it is for that body to determine the question of taxation. In the statute now under consideration the State has enacted that as a condition of exercising a power of appointment, it shall be 'deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power.' \* \* \* It being the privilege upon the right to succession to property by means of a will that is taxed, and the subject of the litigation being within the jurisdiction of the State, it seems clear that the beneficiary under the power of appointment contained in the will of Caroline C. Hull, a resident of this State, upon the exercise of that power by Wager J. Hull, likewise a resident of this State, is bound to pay the tax imposed upon that privilege, regardless of the question of where the property to which the power related was located.

Ida M. Hull gets all of her rights in and to the property by reason of the exercise of the power, a privilege granted by the State of New York, and she may not be relieved from that obligation because of the fact that the property itself was without the jurisdiction of the State at the time the power was exercised."

In *Matter of Dows* (167 N. Y. 227) practically the same question was presented, and the court there held: "But whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it. \* \* \* If, as said by the Supreme Court of the United States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the State which it may tax or charge for, it follows that the right of a testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the State. When David Dows, Sr., devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself, that is, for the privilege of succeeding to property under a will."

In both of these cases, however, the beneficiaries under the will of the respective donees unquestionably took under a will probated under the laws of the State of New York, whereas, in the case at bar the testatrix had only to execute a will in conformity with the laws of the State of Massachusetts in order to exercise the power of appointment conferred upon her under the wills of her father and grandfather. This she did, and her will has not been offered for probate in this State.

In *Matter of Delano* (176 N. Y. 486) the Court of Appeals again considered the validity of a transfer tax imposed upon the exercise by will of a power of appointment conferred upon the testatrix. In that case the power had been conferred by deed and not by will. The Appellate Division, First Department (82 App. Div. 147), held that as the deed in question

was made and delivered prior to the enactment of the Transfer Tax Act, the estate passing upon the exercise of the power of appointment by Laura Astor Delano was not taxable. The opinion in the Appellate Division attempted to distinguish the facts in the *Delano* case from the facts in *Matter of Vanderbilt* (50 App. Div. 246; *affd.*, 163 N. Y. 597), in which case the validity of the tax imposed under the aforesaid section of the then existing Tax Law was upheld. The decision of the Appellate Division was, however, reversed in the Court of Appeals (176 N. Y. 486). The Court of Appeals did not question the general rule that the theoretical source of title of the beneficiary under the will of Mrs. Delano was the deed which granted the power of appointment, but held, Judge VANN writing: "The statute, as we read it, does not attempt to impose a tax upon property, but upon the exercise of a power of appointment. The power in this case was exercised by will, in such a way that the appointee became entitled to all the property, instead of an aliquot part. While the property came to him by deed from his grandfather, only a part of it could have reached him but for the will of his aunt. His title to the most of it depended on the will, as well as upon the deed. He is compelled to resort to the will in order to establish his right, for the deed alone will not suffice. The privilege of making a will is not a natural or inherent right, but one which the State can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the Legislature sees fit to create. The payment of a sum in gross, or of an amount measured by the value of the property affected, may be exacted, or the right may be limited to one or more kinds of property and withdrawn as to all others. The Legislature could provide that no power of appointment should be exercised by will, or that it should be exercised only upon the payment of a gross or ratable sum for the privilege. It could exact this condition, independent of the date or origin of the power. All this necessarily flows from the absolute control by the Legislature of the right to make a will. \* \* \* As the tax is imposed upon the exercise of the power, it is unimportant how the power was created. The existence of the power is the important fact, for what may be done under it is not

affected by its origin. \* \* \* The statute applies to all powers alike, without distinction on account of the method of creation or the date of creation, and provides that the exercise of the power shall be deemed a taxable transfer of the property affected, the same as if it had belonged absolutely to the donee of the power and had been bequeathed or devised by such donee."

The decision of the Court of Appeals in the *Delano* case was sustained in the United States Supreme Court in *Chanler v. Kelsey* (205 U. S. 466). The opinion was written by Mr. Justice DAY and the court held that the assessment of the tax under the New York State law was not in violation of the Federal Constitution (Art. 1, § 10, subd. 1; 14th Amend., § 1), and that the State had a clear right to tax the exercise of a power of appointment. The learned justice said, in part, referring to the objection that property was being taken without due process of law: "In support of this contention, common law authorities are cited to the proposition that an estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power; that the beneficiary takes, not under the execution of the power by the donee, but by authority and under grant from the grantor, in like manner as if the power and the instrument which created it had been incorporated into one instrument. \* \* \* However technically correct it may be to say that the estate came from the donor and not from the donee of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs in error became complete. \* \* \* It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others. Notwithstanding the common law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title."

It follows from the above decisions that while upon principle an inheritance tax is not one upon property but is rather one upon the succession of property, the State has also the



right to levy a tax upon the exercise of a power of appointment in any case wherein such power is executed by virtue of the authority granted by the State whenever such authority or privilege is necessary to pass the title of the property to the beneficiary.

The Court of Appeals has held in *Matter of Fearing* (200 N. Y. 340) that when property is transferred under a power of appointment and the appointee is a resident of another State, a tax cannot be assessed on the transfer for the reason that the privilege of exercising the power is granted by the laws of a State other than the State of New York. The opinion was written by Judge GRAY, who says, in part: "Such an appointment to others was, for the purposes of taxation, to be deemed the equivalent of a bequest, or devise, by the donee of the power of property belonging to the donee. Prior to this amendment of the Transfer Tax Law, there was no provision for the taxation of transfers under powers of appointment; but, with the passage of the amendment, the privilege of exercising the power by will was subjected to the charge of a tax upon the right of the appointees to take. Whereas, previously, the source of the appointees' right of succession was deemed to be in the will creating the power of appointment; thereafter, it was to be deemed to be in the execution of the power itself. The actual transfer effected by the exercise of the power was to be taxed. The Legislature, in the exercise of its control over testamentary dispositions of property, could validly burden such transfers with a tax, regardless of the technical source of the title of the appointee under the rules of the common law."

In the *Fearing* case the donee of the power was a non-resident of this State. The property transferred under her will in the exercise of such power was bonds outside of the State of New York. The grantor of the power, Daniel B. Fearing, died in 1870, a resident of the State of New York, leaving a will which created the power and which will was in this State admitted to probate. The only question which appears to have been determined in *Matter of Fearing* is that a tax cannot be levied under our Tax Law upon the exercise of a power of appointment by a donee who is a non-resident of this State and who attempts to execute the power by a will or deed

made pursuant to authority conferred by another State. It does not, however, necessarily follow that the State of New York has any constitutional authority to levy a tax upon a transfer of property under a power of appointment the exercise of which is not wholly dependent upon a privilege granted by this State. In the case at bar the decedent has exercised the power of appointment conferred upon her under the wills of her father and grandfather by an instrument which has been admitted to probate in the State of Massachusetts and which has not been offered for probate in the State of New York. *It is not apparent that the exercise of the power or the validity of the will in question is in any respect dependent upon the laws of the State of New York, or upon any authority or privilege granted or extended by the laws of New York to the testatrix.* Something more than the mere residence or domicile of the testatrix is necessary in order to subject the property to taxation which passed under the exercise of the powers of appointment. The State Comptroller claims that an important privilege has been conferred upon the testatrix by reason of which the State is entitled to assess a tax upon the transfer. One cannot read the will of the testatrix without being impressed that it was her intention to exercise the powers of appointment under the laws of Massachusetts and by a will executed agreeably to the laws of that State, and that she realized and appreciated that she need not take advantage of the laws of the State of New York or of any privilege thereby extended in order to pass a valid title to the property over which she had such power of appointment.

The respondent contends that the question at issue has been twice passed upon in the Surrogate's Court of New York and Kings counties, the first case being that of *Matter of Frazier* (N. Y. L. J. March 28, 1912), and the later case, *Matter of Seaman* (Id. Dec. 5, 1913). In *Matter of Frazier* (*supra*) the decedent was a resident of this State and exercised a power of appointment under a last will and testament which was propounded and admitted to probate in this State. The learned surrogate, in commenting upon the right of the State to assess a transfer tax, said: "The right of an individual to make a will or testamentary instrument is not a natural or inherent right, but a privilege which the State can grant or withhold at its

discretion. \* \* \* The transfer tax is not a tax on property, but on the privilege granted by the State to an individual to succeed to the property of a deceased person, and the power which confers this privilege may impose a tax upon it. [*Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283.] As the decedent was a resident of this State the privilege of making a will by which she disposed of the property constituting the trust fund was one granted by this State. That she might have exercised the power by an instrument in writing in the nature of a last will and testament is immaterial, because as a matter of fact she did not attempt to exercise the power by any other writing than that propounded in this State as her last will and testament. \* \* \* The trustees of her father's estate paid to the executors appointed under the decedent's will in this State the property constituting the trust fund held by them, and the executors distributed this property to the various legatees in accordance with the provisions of decedent's will. Therefore, the right of these legatees to succeed to the property was derived from the will of decedent, and upon this privilege the State of New York may impose a tax."

In the *Seaman Case* (*supra*) the surrogate based his decision upon the authority of *Matter of Frazier* (*supra*).

In the case at bar, however, no distribution has taken place by virtue of the laws of the State of New York, nor has any property been transferred for distribution to an executor or administrator appointed in this State, nor has the decedent's will been admitted to probate in the State of New York. In fact, neither the testatrix nor any of her personal representatives have endeavored in any way to take advantage of the laws of the State of New York for the purpose of passing the title to or distributing any part of decedent's estate.

While the last two cases cited seem to be some authority on the side of the respondent, *Matter of Thomas* (39 Misc. Rep. 136) holds that under a quite similar state of facts the State was not authorized to assess a tax upon the transfer under a power of appointment there involved. The decision was made in 1902. The donor of the power there under consideration was Edwin L. Parker, who was a resident of Baltimore county in the State of Maryland. In his will, made and proved in Maryland in 1868, he devised and

bequeathed a portion of his residuary estate to three trustees then and at all times thereafter residents of the State of Maryland, upon a trust to keep the same invested and pay the income to the testator's daughter, Cordelia P. Thomas, during her lifetime, and after her death to pay or transfer the same in such manner as she by her last will and testament might direct. Cordelia P. Thomas married and died in 1902, a resident of the county of New York, leaving a will in which she exercised the power of appointment thus conferred. This will was admitted to probate in the county of New York and was subsequently determined to be a valid execution of the power of appointment under her father's will in the city of Baltimore, in a decree which directed that the trustees under the will of her father pay over the fund in their hands to the appointees of the testatrix. All of the assets of the estate, like those in the case at bar, were outside of the State of New York. The learned surrogate said: "A strictly literal construction of the statute would require the imposition of the tax, but I cannot think that the Legislature intended such a result, as applied to the facts of the present case, and I am of opinion that, if it did, the statute cannot be enforced. In all of the cases it is quite clearly asserted that the tax is one, not upon property, but upon transfers of property made by will or descent, where the right to make or receive such transfers is accorded by the laws of this State, and which right the sovereign power of this State may lawfully abridge by the amount of the tax. It was upon this ground that the provision of law now under consideration was determined to be constitutional.

"In the present case no transfer of any kind of any part of the assets of the estate of Edwin L. Parker, in the hands of his trustees at the time of the death of his daughter, has been effected or permitted by any law of the State of New York. All of those assets were in the State of Maryland, held by trustees residing in Maryland, under a will of a citizen of Maryland, pursuant to the laws of that State. It is true that the will of the decedent which effected the appointment was executed here, but it derived none of its force or validity from our law. Its legal effect depended entirely upon the law of Maryland, and if its probate in this State was necessary

or useful for any purpose, it was only because the law of the State of Maryland so declared."

Had it become necessary in the case at bar to admit the decedent's will to probate in this State for the purpose of passing the title to any part of the property over which the decedent had a power of appointment, or had the personal representatives of the deceased elected to take advantage of our laws for the purpose of passing the title to such property, there might be some argument that the State would be authorized to assess a tax upon the remainders upon the theory that such power was exercised by virtue of a privilege conferred by the laws of New York. *It was not necessary to the exercise of such power to probate the will here*, and it was not probated here. The case, therefore, is barren of any proof showing that the State of New York has granted any right or privilege which has in any way affected the passage of the title to the property which the beneficiaries clearly have the right to possess under the laws of the State of Massachusetts and under the wills in question.

It, therefore, follows that the determination reached by the surrogate in respect to the right of the State to assess a tax under the section of the Tax Law above mentioned was erroneous.

Having reached the conclusion that said remainders are in no event subject to taxation, it is unnecessary to consider the second question raised by the appellant respecting the manner and time of such taxation, or the amount of tax to be assessed.

The order appealed from should be reversed, with costs to the appellants against the respondent, and the matter remanded to the surrogate of New York county for disposition in accordance herewith.

DOWLING, LAUGHLIN, SMITH and GREENBAUM, JJ., concur.

Order reversed, with costs to appellants against respondent, and proceeding remitted to Surrogates' Court for further action in accordance with opinion. Settle order on notice.

ELLIOTT SERVICE COMPANY, Appellant, v. DISPATCH PHOTO  
NEWS SERVICE COMPANY, INC., and Others, Respondents.

First Department, July 1, 1921.

**Injunction — unfair competition — corporation using another's methods in furnishing photographic and pictorial news service — injunction pendente lite granted.**

A motion for an injunction *pendente lite* should be granted in favor of a domestic corporation, engaged in furnishing photographic and pictorial news service and also photographic news to banks and other financial institutions by means which it has devised, against another corporation which was formed by one of its former employees and which copied plaintiff's methods, *first*, in the use of headings for ordinary news service which simulated those of plaintiff and especially in the use of wire towers and other structural representations which produce the effect of plaintiff's headings; *second*, in the use of contract slips or blanks which in color, language, shape and arrangement are copies of those used by plaintiff.

APPEAL by the plaintiff, Elliott Service Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of May, 1921, denying plaintiff's motion for an injunction *pendente lite*.

Oscar W. Jeffery of counsel [Jeffery, Kimball & Eggleston, attorneys], for the appellant.

Thomas A. O'Connor of counsel, for the respondents.

DOWLING, J.:

Plaintiff, which is a domestic corporation having its principal place of business in the borough of Manhattan, city of New York, has been continuously engaged in business since July, 1913, in furnishing a photographic and pictorial news service to be used for window display advertising purposes known as a "service;" this service consists of copies of large photographs of interesting current events, prepared and furnished by plaintiff to its customers several times a week contained in frames furnished by it adapted for the easy withdrawal and insertion of photographs; below the photograph appears

printed matter known as a "caption" intended to attract public attention, and below both of these appears the advertising card bearing the advertisement of the merchant using the service. This service is now being furnished to over 5,000 subscribers throughout the United States. To identify the service plaintiff used the name "Associated News Service" which it printed in large type at the top of the sheet bearing the photograph and caption, against a background of wires extending over a telegraph pole at each end of the said title to circles containing representations of the eastern and western hemispheres; below the title of the service appears in white letters on a black background the words "World's Latest Events In Pictures." The frames containing the matter furnished for its service by plaintiff are of uniform size and arrangement. In October, 1918, plaintiff devised a system for furnishing similar photographic news to banks and other financial institutions throughout the country. This is known as a bank service and also consists of a frame with three strips across the face thereof dividing the same into panels containing at the top an advertisement of the institution, below that the photograph, then a third panel containing the caption, and then a final panel containing a so-called "thrift message." In January, 1919, plaintiff further extended its service so as to cover industrial enterprises, the usual photographic service being extended by providing a space for messages to employees intended to promote the betterment of industrial relations. Plaintiff has expended large sums of money in the promotion and advertisement of its business.

The defendant Harris was in plaintiff's employ as a solicitor or salesman from August, 1918, until November, 1920, and about a month after leaving the same he formed a copartnership with the defendant Mullany for the purpose of conducting a business similar to that of plaintiff under the name of "Dispatch News Service." Thereafter and in February, 1921, the individual defendants caused the defendant corporation, Dispatch Photo News Service Company, Inc., to be incorporated under the laws of the State of New York for the purpose of carrying on a business similar to that of the plaintiff, and that corporation took over the business theretofore conducted by the individual defendants.

It is because of the manner of doing business by defendants and because of their unfair appropriation of the methods, paraphernalia, literature and printed matter of the plaintiff that this action is brought.

The most casual inspection of the exhibits in the case leads to the conclusion that the defendants' purpose was to copy as closely and as fully as it could be done the service of the plaintiff in all its details. Plaintiff uses in soliciting subscriptions contract slips varying in color with the length of time for which the subscription is entered; the contract for three months' service is printed on blue paper; that for six months on yellow paper, and that for a year on white paper. The defendants have copied the size, shape, color and language of these contracts both on the face and the back thereof until they are exact replicas of plaintiff's stationery. The rates for service are identical, the spacing is the same, the blanks to be filled in are in the same position and it is impossible to escape the conclusion that the methods of soliciting business in this particular used by plaintiff were purposely copied by defendants even though they did not use upon the top of their slips the sketches used upon the service. The defendants made use in their service of a frame closely similar in shape, size and general arrangement to that used by plaintiff for its several kinds of service. In the heading of defendants' photographic services they used the words in large black type "Dispatch News Service" against a background of dots supposed to represent a wireless communication between two towers inserted at either end of the name, and behind which there appears on one side a representation of a locomotive and an aeroplane above and at the other side a steamship with an airship above. Below the name of the service appear the words printed in white against a black background "News of the World in Pictures." The effect of this heading is to reproduce to an observer the effect of the plaintiff's heading upon its service, and while in some of its details the defendants' device varies from the plaintiff's, the result of the careful arrangement of the elements making up defendants' title is to produce a palpable simulation of that of plaintiff.

In so far as the heading upon this ordinary service is



concerned there is a clear violation of plaintiff's rights. The defendants have been so solicitous to copy plaintiff's methods that where the plaintiff for reasons of its own found it advisable to omit its name entirely from the service which it furnished to financial institutions and to have at the top of the frame simply the name of the bank which subscribed for the service, the defendants have slavishly copied this service and have also refrained from using their name upon their competing service.

While there are some details of plaintiff's claim which are sufficiently in doubt to necessitate the decision of its rights thereto upon a trial the denial at this time of all the relief which the plaintiff has demanded is not to be taken as an expression of our opinion upon the merits of the controversy. For the present it is sufficient to say that we believe that plaintiff is entitled to a temporary injunction restraining the defendants, pending the trial of this action, from further violation of plaintiff's rights in the following particulars: *First*, in the use of the heading used by them upon their ordinary news service which, as has been shown, simulates that used by plaintiff, the particular part thereof which is most objectionable and the use of which should be absolutely discontinued being the combination of wire towers and other structural representations which produce the effect of plaintiff's heading; *second*, in the use of the contract slips or blanks which in color, language, shape and arrangement are copies of those used by plaintiff.

These being the more glaring instances of unfair trade competition and those by which the greatest damage is likely to be wrought to plaintiff pending a trial of the other issues, the relief sought is granted to that extent.

The order appealed from will, therefore, be reversed, with ten dollars costs and disbursements, and the motion granted to the extent indicated, with ten dollars costs.

CLARKE, P. J., SMITH, PAGE and GREENBAUM, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion granted as indicated in opinion, with ten dollars costs. Settle order on notice.

STELLA HAAS, Respondent, v. BENJAMIN HAAS, Appellant.

First Department, July 1, 1921.

**Husband and wife — separation — affidavit on motion to punish defendant for contempt insufficient for failure to show that sequestration proceedings would be ineffectual — judgment compelling defendant to provide for maintenance of children unwarranted where complaint dismissed upon merits.**

The moving affidavit on an application to punish the defendant in a separation action for contempt for failure to pay the allowance awarded for the support of his children, which merely states that defendant has no bank account, nor business of his own, and that his salary is a certain sum per week, is insufficient to satisfy the court that sequestration proceedings will be unavailing.

A judgment may not be rendered under section 1766 of the Code of Civil Procedure compelling the defendant in an action for separation to make provision for the maintenance of the children of the marriage, where the complaint is dismissed upon the merits.

APPEAL by the defendant, Benjamin Haas, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of March, 1921, adjudging the defendant guilty of contempt of court.

*Nathaniel Cohen*, for the appellant.

*Joseph Gans* of counsel [*C. Arthur Jensen* with him on the brief], for the respondent.

MERRELL, J.:

This appeal is by the defendant from an order adjudging him in contempt of court for failing to pay an allowance of \$4 a week provided by the judgment herein for the support and education of the infant daughter of the parties, and also by reason of the failure of the defendant to bear the expense of medical and surgical treatment of said daughter while ill. The court in the order adjudging the defendant guilty of contempt for a willful and deliberate violation of said decree imposed a fine of \$704, that being the amount of defendant's default in said payments for the support, education and medical attendance of said daughter of the parties.

The action was brought by the plaintiff to obtain a decree of separation from the defendant because of the latter's cruel and inhuman treatment of the plaintiff. The defendant answered in the action and set up a counterclaim of abandonment of the defendant by the plaintiff. The issues were tried and at the close of the trial the court at Special Term rendered judgment dismissing the complaint upon the merits and also dismissing upon the merits the counterclaim interposed by the defendant. Assuming to act in pursuance of section 1766 of the Code of Civil Procedure the court in the judgment herein awarded the care, custody and control of Arline Haas, the infant daughter of the parties, to the plaintiff with the privilege to the defendant of seeing and taking out said child between the hours of ten o'clock in the forenoon and six o'clock in the afternoon every Sunday, said decree providing that the child be sent by the plaintiff, accompanied by a proper person. It was further ordered, adjudged and decreed in and by said judgment that the defendant pay to the plaintiff the sum of four dollars per week as and for the maintenance, support and education of said infant daughter of the parties, such payments to commence from the date of the entry of said decree in March, 1918, with the privilege to the plaintiff of applying to the court for an additional allowance for the maintenance, support and education of said infant as the cost of the maintenance, support and education of said infant should increase or in the event of an increase in defendant's income. It was also provided in the said judgment that the defendant pay any and all medical and drug bills that might be incurred in good faith by reason of any illness from which said infant might suffer. Provision was also made for the removal of said infant daughter to the country and the plaintiff was required to bring the child back to the city each Sunday in case she remained in the country for a period of more than four weeks.

The moving affidavits herein established to the satisfaction of the court that following the entry of said decree a certified copy thereof was served upon the defendant, and that he thereupon paid the weekly allowance of \$4 up to and including May 23, 1918, and that from said date until the institution of these contempt proceedings the defendant had paid nothing

for the support of said infant daughter of the parties. The affidavits also show that in the spring of 1919 the said daughter became sick with tonsilitis necessitating an operation, and that the bill, amounting to \$152, incurred for medical services in connection therewith, was presented to the defendant, but that he refused to pay the same, and that thereupon the plaintiff paid said bill. The moving affidavits also show that said child was taken to the defendant's house and left there every Sunday, pursuant to the requirements of said decree, until about five or six months prior to the institution of these proceedings; that the defendant did not see said child or remain with the child but a few minutes when brought to his home, and that on many Sundays he was not at home at all when the child was taken there, and on some occasions he left a few minutes after the child's arrival, remaining away the balance of the day; that notwithstanding such treatment on the part of the defendant, the child was taken each Sunday to the defendant's home, until five or six months prior to the institution of these proceedings, when the plaintiff stopped sending the child at the child's request and upon the child's representation that she did not want to go because of constant quarrels and fighting at the home of the defendant's sister where the defendant resided; that the plaintiff sent said daughter to the defendant's home regularly every Sunday for two years and a half after the defendant defaulted in his payments for the support of said child.

The defendant in his affidavit opposing the contempt proceedings swears that after the denial of a judgment of separation herein the plaintiff went to Reno, Nev., and obtained a divorce there and subsequently remarried, and that thereupon the defendant brought action against the plaintiff for absolute divorce which was pending and about to be tried at the time of the institution of these contempt proceedings. The defendant avers in his affidavit that since March, 1918, he was denied access to his said child, and that solely upon the ground of such refusal he had refrained from paying the amount directed by the judgment.

The court entertained the application to punish the defendant for contempt, and granted the order appealed from.

The defendant seeks a reversal of the order adjudging him

in contempt and penalizing him therefor, upon two grounds: *First*, that the moving papers upon which said order was granted were insufficient in that they did not show that sequestration proceedings would be ineffectual; and *second*, that the action for separation having been dismissed upon the merits, the court was powerless to make a decree awarding the custody of the infant daughter of the parties to the plaintiff and making said provision for her support by defendant. I think the order appealed from should be reversed upon each of the grounds urged by the appellant.

As to the insufficiency of the papers upon which the order was granted, the Code of Civil Procedure (§ 1772) provides that where a husband defaults in making any payment required by a judgment or order in an action for separation, the court may cause his personal property and the rents and profits of his real property to be sequestered. Section 1773 of the Code provides that the defaulting husband may be punished in contempt for failure to pay any sum required by section 1772 where it appears presumptively to the satisfaction of the court that payment cannot be enforced by means of sequestration proceedings. In short, the Code requires that before the husband can be punished for contempt the court must be satisfied that sequestration proceedings will be unavailing to collect the moneys required to be paid. In an effort to comply with the Code requirement, the plaintiff stated in her moving affidavit: "That the defendant has no bank account, nor has he a business of his own, but is working as a union cutter for a weekly salary and earns about \$60.00 per week. That for the reasons stated a sequestration proceeding against the defendant would be of no avail, for the purpose of collecting the aforesaid money." No other averment than the above is offered to satisfy the court that sequestration proceedings would be unavailing, and such averment was clearly insufficient. The affidavit does not state that defendant has no personal property other than a bank account or a business, nor does it state that he has no real estate, the rents and profits from which might be sequestered. The plaintiff merely swears that defendant has no bank account nor business of his own. The moving affidavit clearly deficient. (*Sandford v. Sandford*, 44 Hun, 564;

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*Whitney v. Whitney*, 19 Civ. Proc. Rep. 265.) There must be a strict compliance with the statutory requirements. (*Matzke v. Matzke*, 185 App. Div. 533.) There was no sufficient basis for the order to punish the defendant for contempt.

I am also of the opinion that having dismissed the complaint upon the merits, the court was without power to render judgment compelling the defendant to provide for the maintenance of the infant daughter of the parties. The respondent attempts to justify the judgment rendered under section 1766 of the Code of Civil Procedure. While the general language of that Code section might seem to support such contention, yet the court is only thereby permitted in a proper case to render a judgment compelling the defendant to make provision for the maintenance of the children of the marriage without rendering a judgment of separation. The Code (§ 1766) falls far short of authorizing such a judgment where, as in the case at bar, plaintiff is denied a judgment for separation and her complaint is dismissed *upon the merits*.

The courts have quite uniformly held that while a judgment may be rendered under section 1766 of the Code of Civil Procedure in an action for separation, compelling the defendant to make provision for the maintenance of the children of the marriage where, under the circumstances of the case, such a judgment is proper without rendering a judgment of separation, section 1766 of the Code applies only *where a separation can be decreed upon the evidence*. (*Davis v. Davis*, 75 N. Y. 221; *Ramsden v. Ramsden*, 91 id. 281; *Kamman v. Kamman*, No. 1, 167 App. Div. 423; *Robinson v. Robinson*, 146 id. 533; *Chamberlin v. Chamberlin*, 193 id. 784.)

In the case at bar the learned justice held that the evidence was insufficient to justify a judgment for separation and dismissed the complaint. The requirement, therefore, that the defendant pay for the maintenance of the infant daughter of the parties was without authority of law.

The order appealed from should be reversed and the motion denied, without costs.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ.,  
concur.

Order reversed and motion denied, without costs.

JOHN FLEMING, Plaintiff, v. JAMES J. LARKIN, as Sole Surviving Executor, etc., of JOHN FLEMING, Deceased, Appellant, Impleaded with JOHN FLEMING, JR., and Others, Defendants, and MORAN TOWING AND TRANSPORTATION COMPANY, Respondent.

First Department, July 1, 1921.

**Pleadings — suit for construction of will — motion by defendant trustee to strike out irrelevant allegations of intervenor demanding payment of its claim against plaintiff granted.**

In a suit to obtain the construction of a will and to determine whether and to what extent the plaintiff is entitled to receive the trust estate, a motion by the defendant trustee to strike out allegations in the answer of an intervenor setting forth the particulars with reference to its claim against the plaintiff and its reduction to judgment, the issuance of a garnishee execution and the obtaining of a lien against said trust estate and the income thereof, and the demand for judgment that the funds in the hands of the defendant trustee be held liable for the claim of said intervenor and that payment be decreed, should have been granted, for such matters are clearly not within the controversy as determined by the complaint.

APPEAL by the defendant, James J. Larkin, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of March, 1921, denying said defendant's motion to strike out each and every affirmative defense from the answer of the defendant Moran Towing and Transportation Company.

*Thornton Earle*, for the appellant.

*David L. Podell* of counsel [*Benjamin S. Kirsh* with him on the brief], for the guardian of John Fleming, Jr., defendant, in support of appellant.

*Donald H. Millard* of counsel [*Paul Bonyngé*, attorney], for the respondent.

MERRELL, J.:

This appeal is from an order denying the motion of the defendant James J. Larkin, as sole executor and trustee under

the last will and testament of John Fleming, deceased, for an order to strike from the answer of the defendant Moran Towing and Transportation Company each and every affirmative defense therein set forth.

This action is brought in equity by the plaintiff John Fleming to procure a judicial construction of the last will and testament of his father, John Fleming, deceased, and to obtain the decree of the court directing the defendant James J. Larkin, as sole surviving executor of and trustee under his father's will, to pay over to the plaintiff the whole or a part of the residuary estate of his said father. The will of John Fleming, deceased, among other things, by its 14th clause, provided that the residue of his estate should be held by his executors named in said will, or the survivor of them, in trust to invest the same and receive the income therefrom, to pay taxes and expenses thereon, and pay over the net income therefrom in such sums as testator's said executors in their wise judgment and discretion might deem proper to his son, the plaintiff, until he should attain the age of twenty-five years, at which time, the will provided, by said 14th clause, that he should be paid the sum of \$50,000, and upon the plaintiff reaching the age of thirty years, if at that time, in the wise judgment and discretion of testator's said executors, or the survivor of them, testator's said son, the plaintiff, was capable of properly managing, caring for and preserving the same, then the testator directed that the remainder of his residuary estate be paid over to his son, the plaintiff, absolutely and forever. By said clause the testator further provided that in case said executors in their wise judgment and discretion should determine that the plaintiff was not capable of properly managing and caring for the remaining principal of the residuary of testator's estate upon arriving at thirty years of age, then the executors, or the survivor of them, were directed to continue said trust until such time as they might determine that the plaintiff was competent to properly manage and care for the same or until his death, in the meantime paying the net income to testator's said son, the plaintiff, in such sums and at such times as said executors might elect. In the event of the death of said son before distribution of



said residuary estate, the testator left the same to other beneficiaries.

The plaintiff, in his complaint, alleges that he has attained the age of thirty years, and that he has since his father's death conducted his business, and that the defendant Larkin, as sole surviving executor and trustee under said will, has determined and should determine that the plaintiff is entitled to said residuary estate, and the plaintiff demands judgment for a construction of his father's will, and particularly the 14th clause thereof, in such manner that the defendant, as sole surviving executor and trustee, be directed to pay to the plaintiff the entire balance of said residuary estate.

The defendant Larkin, as sole surviving executor, answered in the action, denying the allegations of the plaintiff's complaint as to his ability to successfully manage the residuary estate, and alleging the necessity for the continuance of said trust in the hands of said defendant.

The Moran Towing and Transportation Company, after the commencement of said action, applied to the court for leave to intervene as a party defendant, alleging that it was a judgment creditor of the plaintiff and had obtained a judgment against him in the Kings County Supreme Court on July 13, 1920, in the sum of \$18,243.14, and that execution against said plaintiff was returned unsatisfied, and that thereafter an order was made and entered directing a garnishee execution against the income of said residuary estate held in trust by the defendant Larkin and which income was payable to the said plaintiff by said trustee, and that thereupon such execution was issued to the sheriff of New York county and thereby the said trustee was required to pay ten per cent of the income of said estate to said sheriff, and that thereby the Moran Towing and Transportation Company acquired and now possesses a specific lien upon the trust estate and the income thereof, and was a necessary party to the action affecting the same. An order was made permitting said defendant to intervene. Thereupon the said intervening defendant answered, denying the allegations of the 17th clause of plaintiff's complaint, wherein the plaintiff alleged that said plaintiff and the defendant James J. Larkin, as sole surviving executor and trustee of the last will and testament of John Fleming,

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deceased, and John Fleming, Jr., and the other contingent remaindermen named in said will were the only parties interested therein, and by way of further answer to the complaint the said intervening defendant, as a basis for affirmative relief in its favor, alleged and set forth its claim against the estate of the testator and in particular against the interest therein of the plaintiff, alleging and setting forth the particulars with reference to its claim against the plaintiff and its reduction to judgment, the issuance of the garnishee execution, and the obtaining of the lien of said towing company against said trust estate and the income thereof. The intervening defendant, in its answer, demanded judgment adjudging and decreeing that the estate of the decedent and the trust funds and property in the hands of the defendant Larkin, as trustee, were liable for the claim of the said intervening defendant, and that the court decree that the said surviving executor pay to the said intervening defendant in satisfaction of its said claim the balance due, with interest. It was to strike out the allegations of said answer of the intervening defendant that the appellant applied, and his application was denied. In such denial I think the court clearly erred.

The action is brought to obtain a construction of the will of the testator, and to determine whether and to what extent the plaintiff is entitled to receive the trust estate. In the answer of the intervenor an attempt is made to allege and have litigated matters clearly not within the domain of the controversy as determined by the complaint. This may not be done. (*Nauss v. Nauss Brothers Co.*, No. 2, 195 App. Div. 328.)

The defendant trustee properly moved to strike out the irrelevant matter contained in the respondent's answer. He could not demur, and his only remedy was by motion to strike out. (Code Civ. Proc. § 545; *Stibbard v. Jay*, 26 Misc. Rep. 261; *North River Savings Bank v. Buckley*, 130 N. Y. Supp. 787; *Bradley v. Sweeny*, No. 1, 120 App. Div. 315, 317.)

If the plaintiff is unsuccessful in his attempt to procure a decree herein directing the turning over to him of the trust estate and the trust continues, then the rights of the intervenor will be protected under the existing order that the said

defendant be paid ten per cent of the income from the trust fund payable to plaintiff. If the plaintiff succeeds herein in obtaining possession of the corpus of the trust estate, then the judgment of the respondent will certainly be good, and its rights may be amply protected through adequate means provided by law for the enforcement of the lien of its judgment against the plaintiff.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion of the defendant, appellant, be granted, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ.,  
concur.

Order reversed, with ten dollars costs and disbursements, and defendant, appellant's motion granted, with ten dollars costs.

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JOHN DEVOY, Appellant, v. WALTER NELLES, Respondent.

First Department, July 1, 1921.

**Interpleader — notice of application for order must be served in same manner as summons — personal action — action for money had and received — jurisdiction of non-resident cannot be obtained by service of notice of application for order of interpleader outside of State.**

A notice of an application for an order of interpleader under section 820 of the Code of Civil Procedure has somewhat the effect of, and must be served in the same manner as, a summons.

In a personal action brought upon the theory of money had and received, jurisdiction of a non-resident cannot be acquired by service of a notice of an application for an order of interpleader outside the State either personally or by substitution.

APPEAL by the plaintiff, John Devoy, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of May, 1921, substituting as defendants one Hugh Montague "as treasurer of an unincorporated association of more than seven persons known as the Clan Na Gael, and New York Volks-Zeitung, a domestic corporation," in the place and stead of the defendant Walter Nelles.

*John Delahunty* of counsel [*J. J. Kirby* with him on the brief], for the appellant.

*Murray C. Bernays* of counsel [*Hale, Nelles & Shorr*, attorneys], for the respondent.

GREENBAUM, J.:

The action is brought to recover the sum of \$5,000 upon the theory of money had and received by the defendant to the use of the plaintiff.

Section 820 of the Code of Civil Procedure requires that notice of the application for an order of interpleader shall be given to the claimant and the adverse party.

The affidavits of service of the notices on the alleged claimants do not state where either of them was served. The obvious purpose of such a notice is to bring the claimant before the court and give him an opportunity to assert his claim. It has somewhat the effect of a summons and must be served in the same manner as a summons is required to be served.

The affidavit of defendant shows that he wrote to the claimant, treasurer Hugh Montague, addressing him as residing at 127 Autumn street, Passaic, N. J., and that Montague in making answer to that letter refers to his place of business as at No. 1 Montgomery street, Jersey City, N. J. The presumption which was conceded upon the argument is that Montague was served in the State of his residence. In our opinion there was no proof of a valid service upon the alleged claimant Clan Na Gael.

The court cannot acquire jurisdiction by service of the notice on a non-resident outside the State, either by personal service, or by substituted service, and such service is not a compliance with the requirement as to notice of section 820 of the Code.

In *Bullowa v. Provident Life & Trust Co.* (125 App. Div. 545) the court said (at p. 548): "The Code requires notice to the party to be brought in and does not leave it to the court to prescribe what that notice shall be. It necessarily follows that it must be personal notice or the equivalent thereof, and it needs the citation of no authorities to show

that the courts of one State cannot obtain jurisdiction over citizens and residents of another State by notice served by mail or served personally without the State. It is also evident that these provisions of the Code of Civil Procedure contemplate that the notice shall be such that the court may thereby obtain jurisdiction over the party without the service of other process and may thereupon, if the facts warrant it, make the order discharging the original defendant and substituting the new defendant thus brought in on notice. It would seem, therefore, that this section of the Code of Civil Procedure does not authorize such a substitution of a non-resident unless service is made personally within our own State or the party voluntarily appears and submits to the jurisdiction of the court."

This is a personal action and not one *in rem*. The most recent utterance on that subject is the Court of Appeals in *Hanna v. Stedman* (230 N. Y. 326). To the same effect is *Rosenthal v. United Transportation Co.* (196 App. Div. 540).

In *Hanna v. Stedman* (*supra*) the head note correctly summarizes the opinion as follows: "2. Actions or proceedings *in rem* have for their subject specified property which is within the jurisdiction and control of the court to which application for relief is made and do not include an action of interpleader wherein the plaintiff sought and obtained a judgment determining to which one of several conflicting claimants it should pay moneys conceded by it to be due upon a personal claim to some one."

It follows that so far as Hugh Montague, as treasurer of the Clan Na Gael, is concerned the order must be reversed. As to the *Volks-Zeitung*, since it has defaulted on the motion for the interpleader and it does not clearly appear that it even asserts a claim, the order in its entirety is reversed, with ten dollars costs and disbursements, and the motion for interpleader is denied, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ.,  
concur.

Order reversed, with ten dollars costs and disbursements,  
and motion denied, with ten dollars costs.

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First Department, July, 1921.

In the Matter of the Application for a Compulsory Accounting  
in the Estate of JACOB APPELL, Deceased.

AMANDA APPELL EVANS, Formerly AMANDA APPELL, as Executrix and Trustee, Appellant; ALBERT J. APPELL, as Executor and Trustee of the Last Will and Testament of Said Deceased, Respondent.

First Department, July 1, 1921.

**Executors and administrators — order of reference for examination of intermediate account inadvertently granted — objections to intermediate account premature — stay of proceedings under order of reference and prior orders in interest of estate.**

An order of reference providing for the examination of an intermediate account of an executrix and trustee was inadvertently granted as no authority has been provided for such an examination. The filing of objections to the intermediate account was premature.

Since considerable testimony has been taken by the referee it will be in the interest of the estate to maintain the *status quo* and stay all further proceedings under the order of reference as well as proceedings under prior orders from which appeals are pending.

APPEAL by Amanda Appell Evans, as executrix and trustee, from an order and decree of the Surrogate's Court of the county of New York, entered in the office of the clerk of said court on the 17th day of February, 1921, denying the motion made by said executrix and trustee for a stay of proceedings under an order of reference directed by the court and to strike out objections made to an intermediate account filed by her pursuant to an order of the court.

*Benjamin E. Messler* of counsel [*Gustav Lange, Jr.*, attorney], for the appellant.

*Charles A. Flammer*, for the respondent.

GREENBAUM, J.:

It seems to us that the order of reference was inadvertently granted by the learned surrogate. Section 2768, subdivision 8, of the Code of Civil Procedure defines a "judicial settlement" as follows: "The expression, 'judicial settlement,' where it is applied to an account, signifies a decree of a Surrogate's

Court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes, or for certain purposes specified in the statute; and an account thus made conclusive is said to be 'judicially settled.' " The same section, subdivision 9, defines "intermediate account" as follows: "The expression, 'intermediate account,' denotes an account filed in the surrogate's office, for the purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands, and not made the subject of a judicial settlement."

In *Matter of De Russy's Will* (14 N. Y. Supp. 177; *affd.*, 128 N. Y. 619) a former General Term of this department said: "It is a significant omission that no authority has been provided for the examination of an intermediate account of an executor or administrator by means of a reference."

The filing of objections to the intermediate account was premature as was also the appointment of the referee.

Inasmuch, however, as it appears that considerable testimony has been taken by the referee touching the objections filed, we are of the opinion that it will be a saving of expense and in the interest of the estate to maintain the *status quo*, but to stay all further proceedings under the order of reference as well as all proceedings under the orders heretofore made by the Surrogates' Court, from which three appeals are now pending in this court until the determination of said appeals.

An order will be entered in accordance with the foregoing views.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ.,  
concur.

Order modified as directed in opinion and as so modified affirmed. Settle order on notice.

RUTH VOGEL, Respondent, v. PERCY R. PYNE, 2d, Appellant,  
Impleaded with ANDERSON T. HERD, Defendant.

First Department, July 1, 1921.

**Bills and notes — action by assignee against accommodation indorser — evidence of fraud of maker in procuring indorsements by defendant and of interest of plaintiff's assignors who are witnesses in result of action — erroneous direction of verdict— burden of proof to show that plaintiff's assignors were bona fide holders — question for jury — new trial on ground of newly-discovered evidence.**

In an action by an assignee upon promissory notes indorsed by the defendant it was error for the court to direct a verdict for the plaintiff, where it appeared that the defendant indorsed the notes for accommodation, that the indorsements were obtained by the maker through trickery and fraud, and that the plaintiff's assignors who were called by her as witnesses were directly interested in the result of the action.

Where the defendant presented sufficient evidence of fraud on the part of the maker in obtaining the indorsements the burden of proof was upon the plaintiff to show that her assignors had paid a fair value for the notes and had acquired them in good faith.

Where the determination of an important issue depends upon an interested witness whose testimony is suspicious or where the attendant circumstances are inconsistent with the conduct of a *bona fide* holder of the notes for value, it is for the jury to say, although there is no direct oral or written testimony contradictory of that given by such witness, whether his testimony is to be credited and whether he was a *bona fide* holder of the notes for value.

A new trial will be granted upon the ground of newly-discovered evidence, as it appears that certain facts have developed since the trial of the action bearing strongly on the good faith of the assignors and of such a nature as will probably change the result, and that such facts could not have been discovered before the trial by the exercise of due diligence.

APPEAL by the defendant, Percy R. Pyne, 2d, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 22d day of November, 1920, on the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 8th day of December, 1920, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes, and also from an order denying defendant's motion for a new trial on the ground of newly-discovered evidence.



*Stephen P. Anderton* of counsel [*William C. Armstrong* with him on the brief; *Beekman, Menken & Griscom*, attorneys], for the appellant.

*Nathan Burkan*, for the respondent.

GREENBAUM, J.:

Plaintiff sues as assignee of one Harvey C. Sickler upon three causes of action on three promissory notes indorsed by the defendant Pyne. The assignment is based upon a nominal consideration and dated and acknowledged on the same day as the date when the summons was issued in this action.

The notes, one for \$5,000, another for \$10,000 and the third for \$5,000, were drawn by one Anderson T. Herd on January 15, 1920, to his own order and indorsed by himself and then indorsed by the appellant. Each note was payable four months after date. The notes were negotiated by Herd, who although a nominal defendant was never served with process and did not appear in the action, nor was he a witness upon the trial.

An amended complaint alleges as to the first note that it was delivered by Herd to Sickler for value but does not allege that it was negotiated before maturity. As to the second and third notes it is alleged that they were indorsed and delivered for a valuable consideration by Herd to one John H. Carpenter and by the latter to Harvey C. Sickler before maturity.

The answer in addition to a general denial sets up defenses to the effect that on April 30, 1919, appellant at the request and for the accommodation of Herd indorsed his notes payable to his own order aggregating \$150,000 upon certain written promises regarding the disposition of the proceeds of the notes by Herd; that upon maturity of these notes appellant indorsed fifteen similar notes made by the defendant aggregating \$120,000 for the purpose of enabling Herd to replace or renew the first set of notes to that amount; that upon the maturity of the first renewal of the notes he similarly indorsed notes aggregating \$120,000 for the purpose of replacing or renewing the first renewal of notes; that among the last renewal notes

are the three notes in suit, which it is alleged were wrongfully diverted by Herd from the purpose for which they were indorsed by negotiating them to Sickler and Carpenter, who took them with knowledge sufficient to put them on notice. At the conclusion of the case the appellant moved to amend his answer to conform to the proof so as to allege that the notes were obtained by him from Herd by fraudulent representations, stating that the case had been tried on that theory. The court granted the motion to amend to the extent that the answer may be deemed to allege that the notes were obtained by Herd from Pyne through fraudulent misrepresentations. In our opinion there was sufficient evidence to warrant a jury in finding that the original notes and the two renewals thereof were obtained through the trickery and fraud of Herd. It would be an unnecessary burden upon the court to detail the evidence in this case, with which the parties are thoroughly familiar and which is fully outlined in the respective briefs of the learned counsel of the parties.

The Negotiable Instruments Law and the decisions of the courts have firmly fixed the rule that the title of a person to negotiable paper is defective when he obtains it or any signature thereon by fraud or other unlawful means or through any breach of good faith or under circumstances amounting to a fraud and that to constitute notice of a defect in the title of the one negotiating it, the person to whom it is negotiated must have had actual knowledge of the defect or knowledge of such facts that his action in taking the note amounted to bad faith. (Neg. Inst. Law, §§ 94, 95, 98, 115.)

Section 98 of the Negotiable Instruments Law provides: "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

Section 115 provides: "Every person negotiating an instrument by delivery or by a qualified indorsement, warrants: \* \* \* 2. That he has a good title to it; \* \* \* 4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless."

It follows that when the appellant had presented sufficient

evidence of fraud or wrongful purpose on the part of Herd, in obtaining his indorsement, the burden of proof was upon the plaintiff to show that those through whom she claims title to the note, namely, Carpenter and Sickler, had paid a fair value for the notes and had acquired them in good faith. (*Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 201; *Kelso & Co. v. Ellis*, 224 id. 528, 537.)

The learned trial justice evidently realized that there was enough evidence of fraud in the negotiation of the notes on the part of Herd, the maker, and that it was necessary for the plaintiff to furnish evidence of the good faith of Carpenter and Sickler, who were called as witnesses in behalf of plaintiff. It is, however, apparent from a reading of the record that the learned court failed to realize the importance of affording the defendant Pyne a considerable latitude in cross-examining these two witnesses in order that he might if possible show that they were not holders in good faith and that they had knowledge of the origin and purpose of the notes or at least sufficient knowledge concerning them as to put upon them the obligation to inquire as to the purpose for which they were indorsed by Pyne.

The note for \$10,000 and the one for \$5,000 upon which two causes of action were based were negotiated by Herd with Carpenter on January 16, 1920, in the presence of Sickler toward the end of April, 1920, at the joint office of Carpenter and Sickler. The third note for \$5,000, being the first cause of action, was negotiated by Herd with Sickler on January 26, 1920, at the same place. It was shown that Carpenter and Sickler had been friends for upwards of ten years and that they were acquainted and had transactions with Herd during a period of three or four years, and that the personal relationship between Carpenter and Herd was intimate.

The evidence clearly indicates that Carpenter and Sickler were not disinterested witnesses, but on the contrary that they were directly interested in the result of this action. And even if it were assumed that the plaintiff holds an assignment of the notes in her own right, there would then be an implied warranty on the part of the assignor that he had a good title to the notes. (Neg. Inst. Law, §§ 97, 115.)

But aside from this legal assumption, which would show

the interest of these witnesses, the jury would have been warranted in finding that plaintiff is a mere dummy acting for them and that as matter of fact they were directly interested in the outcome of this action. Where the determination of an important issue depends upon an interested witness whose testimony is suspicious or where the attendant circumstances are inconsistent with the conduct of a *bona fide* holder of the notes for value, it is for the jury to say, although there is no direct oral or written testimony contradictory of that given by such witness, whether his testimony is to be credited and whether he was a *bona fide* holder of the notes for value. (See *Canajoharie Nat. Bank v. Diefendorf*, *supra*, 200; *Kelso & Co. v. Ellis*, *supra*, 535, 537.)

It follows that the learned trial court erred in directing a verdict. But independent of the conclusion which we have reached concerning the judgment, we have deemed it desirable also to consider the appeal from the order denying the motion for a new trial upon the ground of newly-discovered evidence. It appears from the papers on appeal that a few weeks after the trial of this action certain facts were developed in bankruptcy proceedings against Herd which were then pending, which bear strongly upon the question of the good faith of Carpenter and Sickler as holders of the notes in suit.

During the course of the trial of this action it was established that one of the considerations which induced defendant Pyne to indorse the original series of notes as well as their renewals was that Herd stated that he had purchased an auxiliary schooner named *David Cohen* and that he desired to use the proceeds of the notes to pay off the indebtedness on that vessel.

Upon cross-examination Carpenter was asked: "Q. Did you ever hear of the *David Cohen* before the 16th of January, 1920?" to which he replied: "Not that I know of."

In the examination of this witness before the United States commissioner on December 10, 1920, he testified that he had received a letter from Herd dated April 10, 1919, which is set forth in the record on appeal and from which it appears that Herd proposed to borrow from Carpenter \$70,000 and to turn over to him all his right, title and interest in the property referred to therein which included the schooner *David Cohen*. There was also a letter produced at the

examination dated May 13, 1919, written by Carpenter to Herd in which it is stated: "Confirming conversation with you and Mr. Knowles, will you kindly send him the following papers in accordance with the understanding: All of the stock of the three companies owning the Schrs. 'Exilda,' 'Arthur M. Gibbons' and 'David Cohen.'"

In addition to the foregoing testimony there is a mass of evidence submitted upon this motion from which it appears that Carpenter and Sickler, and through them a corporation of which Sickler was vice-president, were actually getting the benefit of about \$90,000 of the \$150,000 original notes which Pyne claims were diverted by Herd. It would extend this opinion to an undue length to refer to all the details of the unusual situation which was developed in the bankruptcy proceedings subsequent to the trial of the action. There can be no question but that the newly-discovered evidence has an important bearing upon the trial of this action and that it would probably change the result.

As already stated the evidence was of such a character that it would probably change the result if a new trial were granted. It could not have been discovered before the trial by the exercise of due diligence. It is not evidence which is merely cumulative. We are of the opinion that the interests of justice will be served by reversing the order denying the motion for a new trial, with ten dollars costs and disbursements, and granting the motion.

The judgment is reversed and a new trial ordered, with costs to defendant Pyne to abide the event.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event. Order reversed, with ten dollars costs and disbursements, and motion granted.

In the Matter of the Transfer Tax upon the Estate of ELLEN SCULLY (or<sup>se</sup> ELLEN P. SCULLY) Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;  
STATE BANK OF CHICAGO, as Administrator, etc., of ELLEN SCULLY, Deceased, Respondent.

First Department, July 1, 1921.

**Taxation — transfer tax — unverified petition in application for exemption from transfer tax has no probative value — order for exemption reversed and proceeding remitted to surrogate.**

Where a petition in proceedings for exemption from transfer tax is based upon information and belief and does not state any of the sources of information upon which the petitioner relies and is not sworn to, it has no probative value in the absence of any affidavit, and an order granting the exemption will be reversed and the proceeding remitted to the surrogate.

APPEAL by the Comptroller of the State of New York from an order of the Surrogate's Court of the county of New York, entered in the office of the clerk of said court on the 10th day of March, 1921, declaring the estate of Ellen Scully exempt from transfer tax.

*Lafayette B. Gleason*, for the appellant.

*Joseph F. McCloy*, for the respondent.

GREENBAUM, J.:

The proceedings for exemption were based upon a petition made by the State Bank of Chicago, an Illinois corporation, which recited that Ellen Scully died on the 25th day of March, 1920, a resident of Cook county, State of Illinois; that the said Bank of Chicago was duly appointed administrator of her estate by the Probate Court of Cook county; that she was the widow of one John Scully, who died a resident of the State of Illinois on the 25th day of January, 1920, just two months before his widow died; that John Scully left a will bequeathing his entire estate to his widow and that the said Bank of Chicago was also administrator with the will annexed of the said John Scully's estate; that among the assets of

the latter's estate were certain shares of stock of New York corporations which had been duly appraised and taxed as a part of his estate in proceedings in the Surrogate's Court of New York county in October and November, 1920.

Due notice of the application for exemption was given to the State Comptroller, who appeared in opposition, but filed no affidavits and offered no proof, nor made any claim in contradiction of the matters set forth in respondent's petition. Among other things the appellant contends that the petition has no probative value inasmuch as it appears that it is not verified. The appellant is technically correct in stating that there was no verification of the petition. It is signed by the "State Bank of Chicago, William C. Miller, Trust Officer," and following the signature we find instead of a verification an acknowledgment of the petition in the usual form appropriate to corporate acknowledgments. Since the petition is based upon information and belief without even stating any of the sources of information upon which the petitioner relies and is not sworn to, the question arises whether there was any legal proof before the court to warrant the order appealed from.

It is well settled that affidavits upon a motion of this kind are in the nature of testimony. (*Matter of Hyde*, 218 N. Y. 55.) But since no affidavit was submitted by the petitioner, the petition had no probative value. It seems to us that the proper course will be to reverse the order and remit the proceeding to the learned surrogate to enable him to appoint an appraiser to take proof as to the facts and report to the court.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concur.

Order reversed and proceeding remitted to Surrogate's Court for further action in accordance with opinion.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
GEORGE STUYVESANT, Appellant.

First Department, July 1, 1921.

**Crimes — carrying concealed weapon — evidence not justifying conviction — licensee not required to have license with him while carrying concealed weapon — failure to exhibit license not a basis for conviction but justifies arrest — presumptive evidence of guilt.**

A judgment convicting the defendant of the crime of carrying a loaded revolver concealed upon his person will be reversed and a new trial granted where it appears that a license had been duly issued to the defendant and at the time of his arrest it had not been revoked.

Sections 1897 and 1898 of the Penal Law do not require a licensee to have the license with him at the time he is carrying a concealed weapon. The failure of the defendant to exhibit a license, if in fact he had one, was not a basis for conviction, although it justified the officer in making the arrest. It was only presumptive evidence.

APPEAL by the defendant, George Stuyvesant, from a judgment of the Court of Special Sessions of the City of New York held in and for the borough of Manhattan, rendered on the 5th day of April, 1921, convicting him of the crime of unlawfully possessing and concealing a firearm in violation of section 1897 of the Penal Law.

*Moses A. Sachs* of counsel [*Moses H. Hoenig* with him on the brief], for the appellant.

*Michael J. Driscoll* of counsel; *Edward Swann*, District Attorney, for the respondent.

GREENBAUM, J.:

There is no question that defendant on February 26, 1921, the date of his arrest, had a loaded revolver concealed upon his person and that he then exhibited no license for carrying a revolver. As matter of fact it was uncontradictedly established upon the trial that on October 16, 1920, a license had been issued to defendant pursuant to section 1897 of the Penal Law of this State by a police justice at the city of



Troy and that at the time of his arrest the license had not been revoked.

Section 1898 of the Penal Law provides among other things: "The possession, by any person other than a public officer, of any of the weapons specified in section eighteen hundred and ninety-seven of this chapter, concealed or furtively carried on the person, or of the possession of any instrument specified in the last preceding section except as permitted therein, is presumptive evidence of carrying, or concealing, or possessing, with intent to use the same in violation of this article."

The officer was justified in arresting the defendant in the absence of proof that a license had been issued to him. The possession of the revolver under the circumstances was presumptive evidence of a violation of the law. But there is nothing in either section 1897 or 1898 of the Penal Law which requires the licensee to have the license with him at the time he is carrying a concealed firearm.

In *People v. Meyer* (194 App. Div. 822) the defendant, who drove a motor car in Brooklyn, failed to show an operator's license to the police officer when asked to do so, and was charged with violation of section 289 of the Highway Law, which provides that the failure of a licensee to "exhibit his license to any magistrate, motor vehicle inspector, police officer, constable or other competent authority, shall be presumptive evidence that said person is not duly licensed under this article." (See Highway Law, § 289, subd. 1, added by Laws of 1910, chap. 374, as amd. by Laws of 1917, chap. 769, and Laws of 1919, chap. 472.) The court held upon appeal that the failure to exhibit a license if in fact he had one was no basis for conviction. It was only presumptive evidence. To the same effect is *People v. Miles* (173 App. Div. 179).

The judgment of conviction is reversed and a new trial ordered.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concur.

Judgment reversed and new trial ordered. Settle order on notice.

## THE CITY OF NEW YORK, Appellant, v. EMPIRE CITY SUBWAY COMPANY, LTD., Respondent.

First Department, July 1, 1921.

**References — fees of referee — agreement that referees may fix own fees unenforcible — Code Civil Procedure, § 3296, applied — stipulation that referees might elect to take twenty-five dollars per hour complies with Code — referees not authorized to fix fees at lump sum — facts on motion for retaxation too indefinite to enable Appellate Division to tax costs — expense of printing opinion cannot be taxed in absence of stipulation.]**

The provision of section 3296 of the Code of Civil Procedure that the parties to an action may consent to a different rate of compensation for referees from that stated in the Code does not authorize an agreement or stipulation between the parties permitting the referees to fix their own fees, and such an agreement is unenforcible.

However, a stipulation between the parties in effect that the referees may fix their fees at such sum as they think proper, or at their election the sum of twenty-five dollars per hour may be considered a reasonable charge and may be charged by them, is in substantial compliance with the Code to the extent that it provides that the sum of twenty-five dollars per hour shall be considered a reasonable charge.

Under the stipulation in the instant case the referees were not authorized to fix a lump sum for their fees without regard to the number of hours spent in the business of the reference.

The facts developed on the motion for retaxation are too indefinite to enable the Appellate Division to tax the defendant's costs.

In the absence of a written stipulation of the parties there is no legal warrant for taxing the expenses of printing the opinion of the referee and extra copies, for they constitute an item of expense not included in the rules of court.

APPEAL by the plaintiff, The City of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 15th day of March, 1921, denying plaintiff's motion for a retaxation of defendant's bill of costs, which had been taxed by a clerk in the sum of \$40,497.85.

*John R. Salmon* of counsel [*James A. Donnelly* with him on the brief; *John P. O'Brien, Corporation Counsel*], for the appellant.

*Edward L. Blackman* of counsel [*Charles T. Russell* with him on the brief], for the respondent.

GREENBAUM, J.:

This action was brought by the plaintiff for the forfeiture of defendant's system of electrical subways, and for an accounting by defendant under certain contracts subsisting between the parties to this action. The issues were referred upon consent to three referees to hear and determine. Hearings before them commenced on or about October 30, 1916. On November 29, 1918, the referees notified the parties that they were prepared to hand down their decision and that their fees had been fixed by them at the sum of \$80,000.

The decision of the referees as to costs provides as follows: "No costs are awarded to either party against the other. The expense of the reference, that is, fees of the referees and stenographers, and the cost of printing the opinion and report, shall be borne by the plaintiff and the defendant equally."

This court upon a former appeal (191 App. Div. 603) affirmed the direction of the referees with respect to the matter of costs and in the order of affirmance awarded to the "defendant as costs in the action one-half of the amount lawfully required to be paid for taking up the referees' report and one-half of the amount lawfully required to be paid for printing the report and opinion of said referees, such amount to be determined upon taxation before the clerk." On September 22, 1920, costs were taxed by the clerk against the plaintiff at the sum of \$40,497.85, being one-half of the fees paid to the referees and one-half of the amount paid for printing. Plaintiff moved for a retaxation before the Special Term, which denied plaintiff's motion, and it is from the order of denial that plaintiff appeals.

The record shows that the parties stipulated in writing before entering upon the reference as follows: "It is hereby stipulated by and between the parties hereto, through their counsel and attorneys, that the statutory provision for the referees' fees be waived, and that the referees shall fix such sum as they consider proper compensation for the time and effort expended by them in the business of the reference, or at their election the sum of \$25 per hour shall be considered such reasonable charge and may be charged by them."

Section 3296 of the Code of Civil Procedure, which fixes ten dollars as the amount to be paid to a referee for each day expended on a reference, also provides that the parties may

also consent to a different rate of compensation manifested in the minutes of the referee or otherwise in writing.

The Court of Appeals, however, has held that an agreement to permit referees to fix the value of their own services is not in conformity with the provisions of section 3296 of the Code. (*First National Bank v. Tamajo*, 77 N. Y. 476; *Griggs v. Day*, 135 id. 469.) The stipulation so far as it permitted the referees to fix their own fees is unenforcible. It seems to us, however, that it is in substantial compliance with the statute to the extent that it provides that the sum of \$25 per hour shall be considered a reasonable charge. The taxation before the clerk, however, was based upon a lump sum of \$80,000 without regard to the \$25 per hour limitation. The clerk evidently acted upon the erroneous assumption that the stipulation that the referees may fix such sum as they considered proper compensation was permissible under the law. On the motion for retaxation, affidavits were submitted *pro* and *con*. Accepting the affidavits of the referees in the most favorable aspect to them, the number of hours spent by all of them in the matter of the reference falls far short from warranting any such payment as \$80,000. An analysis of the stenographer's minutes made by one of the assistants of the corporation counsel shows that there were fifty-one hearings and twenty-seven adjournments and that the minutes are silent as to the presence of the referees at any of the adjournments. It also appears that one of the referees was present at fifty hearings and the other two on forty-six and forty-two hearings respectively; that at seven of the hearings there were morning and afternoon sessions of three hours each, *i. e.*, six hours per day; that three of the hearings only consumed one hour each and that the remaining forty hearings averaged about three hours each. It also appears that the referees met on occasions to discuss the rulings to be made upon questions of evidence and objections to rulings and that the time thus consumed was about twenty hours. It also appears that the referee to whom was intrusted the task of preparing the draft opinion devoted at least two hundred and sixteen hours to that work and that thereafter the referees met from time to time to discuss the opinion and revisions, consuming about twenty hours, and that nine hours were

devoted to passing upon requests to find. It also appears that one of the referees spent about twenty hours before the hearings began in preparation for the trial.

The referees did not keep any per diem account of their work and their statements are merely estimates. The facts necessary to determine the fees of the referees are too indefinite to enable us to tax defendant's costs.

As to the disbursements for printing the opinion of the referees and extra copies for various persons, it has been held that in the absence of a written stipulation of the parties there is no legal warrant for taxing such expenses because they constitute an item of expense not included in the rules of court. It was so held in *Veeder v. Mudgett* (27 Hun, 519, 523).

The taxation having been made upon an erroneous rule of procedure the order must be reversed and a retaxation directed at the rate of twenty-five dollars per hour for the time consumed by each referee. If the parties in interest can stipulate in writing as to the number of hours devoted to the reference by each referee, and if they stipulate in writing as to the amount to be allowed for printing, the order of reversal will include a retaxation upon the basis of such stipulations.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concur.

Order reversed and motion granted as stated in opinion. Settle order on notice.

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ESTHER D. HARRIS, Appellant, v. JACOB HARRIS, Respondent.

First Department, July 1, 1921.

**Husband and wife — separation — husband not liable for alimony during violation of decree by wife in taking child out of Greater New York without consent — absolute decree of divorce in favor of wife in foreign State justifies court in relieving husband from further alimony — husband liable for alimony between time of voluntary return of wife and modification of decree.**

A husband is not liable for alimony during the time when his wife and child are absent in a foreign State in violation of a decree in separation providing that the wife should not remove the child outside of Greater New York, except upon the written consent of the husband.

App. Div. 646]

First Department, July, 1921.

Where the wife after a decree of separation has been granted her in this State goes to a foreign jurisdiction and there secures, on service by publication, a decree of absolute divorce, the court is justified on the application of the husband in modifying the decree of separation by eliminating the provision for the payment of alimony.

However, while the absence of the wife and child in violation of the decree in separation relieved the husband from the payment of alimony, their voluntary return to the city of New York removed the bar against the wife, and her husband was liable for alimony between the time of her return and the time of the order relieving him from the payment of alimony because of the absolute divorce.

PAGE, J., dissents.

APPEAL by the plaintiff, Esther D. Harris, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 1st day of February, 1921, denying plaintiff's motion to punish the defendant for contempt for failure to pay accrued alimony amounting to \$1,082, in violation of a decree of separation; also from an order, entered in said clerk's office on the 4th day of March, 1921, granting defendant's motion to modify the final decree of separation by relieving him from further obligation to support his wife and directing him to pay \$12 per week for the support and maintenance of their infant child, and also from an order, entered in said clerk's office on the 2d day of March, 1921, denying plaintiff's motion for an order directing the defendant to pay to her the sum of \$270 alimony which had accrued subsequent to the arrears of \$1,082.

*Daniel Handler*, for the appellant.

*Ilo Orleans* of counsel [*Aaron A. Feinberg*, attorney], for the respondent.

GREENBAUM, J.:

The facts, briefly, are as follows: On December 12, 1918, a decree of separation was entered in favor of the plaintiff. It provided for the payment of thirty dollars weekly alimony to the plaintiff and in addition thereto at least ten dollars per month for the use of the infant daughter of the parties. It also provided that the defendant was entitled to visit his child on certain days and under certain conditions therein

mentioned, and further that "the said child shall not be removed outside of the boundary lines of Greater New York, except upon the written consent of the defendant. Should the residence of such child be changed, then the plaintiff shall inform the defendant immediately by registered mail of such change of residence."

It appears that the defendant paid alimony pursuant to the decree up to April, 1920; that thereafter the plaintiff removed the child from the jurisdiction of this court without defendant's consent and took her and resided with her in the State of Nevada. Thereupon the defendant ceased paying alimony. On November 30, 1920, plaintiff obtained a decree of divorce in Nevada. The defendant never appeared in that action and the service upon him was constructive. The Special Term denied the motion to punish the defendant for contempt for arrears of alimony amounting to \$1,082, which had accrued during plaintiff's absence from this State, upon the ground that the plaintiff had violated a provision of the decree by removing the child of the parties outside of the Greater New York limits without the consent of the defendant. We think the motion was properly denied.

The appeal from the order granting defendant's motion to relieve him from further obligations to support his wife was based upon the ground that the absolute divorce which the plaintiff obtained in Nevada terminated the marital status of the parties and relieved the defendant from further obligations to support his wife.

We are of the opinion that the court also properly disposed of that motion. (*Gibson v. Gibson*, 81 Misc. Rep. 508; *Starbuck v. Starbuck*, 173 N. Y. 503.)

The third appeal was from an order denying the plaintiff's motion directing the respondent to pay to her nine weeks' alimony of \$270, which had accrued after her return from Nevada. Defendant opposed this motion upon the ground that the plaintiff's violation of the decree in taking the child outside of the jurisdiction of the court relieved him from paying any alimony. As previously stated, we think that plaintiff was not entitled to invoke the power of the court in contempt proceedings to compel the defendant to pay alimony as required by the decree, when she herself during

the time when the alimony was accruing was violating one of the provisions of the decree. We are of the opinion, however, that the bar against her was removed upon her voluntary return to this State.

Defendant also contends that the decree of divorce obtained by plaintiff in Nevada operated to deprive her of the right to any alimony which accrued after the decree. But the order relieving defendant from paying further alimony, which we are herewith affirming (second appeal), is limited to alimony which would accrue after the making of the motion upon which the order was entered. It did not affect alimony which accrued before the motion was made.

We are of the opinion that the defendant is obliged to pay the alimony amounting to \$270 which had accrued after plaintiff's return to the State and before the modification of the decree. The third order appealed from must be reversed and the respondent directed to pay the \$270. No costs on any of the appeals.

CLARKE, P. J., DOWLING and SMITH, JJ., concur; PAGE, J., dissents.

Appeals Nos. 1 and 2 — orders affirmed, without costs. Appeal No. 3 — order reversed, without costs and respondent directed to pay the \$270 accrued alimony. Settle order on notice.

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CHARLES E. MCINNES & COMPANY, INC., Appellant, v. THE EQUITABLE TRUST COMPANY OF NEW YORK, Respondent.

First Department, July 1, 1921.

**Ships and shipping — action to recover prepaid freight — legal title to vessel in defendant as security for loan under agreement that all freight should be paid defendant by operators and actual owners — defendant chargeable for acts of operators and with notice that money received was freight money — prepaid freight recoverable where goods not delivered — fraud in securing prepayment not essential to cause of action.**

In an action to recover prepaid freight the plaintiff alleged that the defendant held the legal title to the steamer as security for a loan under an agreement with the purchasers, who were operating the steamship, whereby



all freight moneys were to be paid to the defendant to be applied by it to the payment of the loan; that the operators of the ship induced the plaintiff to enter into an affreightment contract and to prepay the freight on the shipment; that such shipment was never transported and the vessel never departed upon the voyage and that the plaintiff rescinded the contract, offered back the bills of lading and demanded the return of its money. *Held*, that the defendant received the freight money in question under its contract with the operators of the boat charged with knowledge that said moneys were freight moneys and charged with all the obligations of the operators for failure of the vessel to make the voyage, and so the defendant was liable to return the money where the voyage was not made and the goods not carried.

A shipowner, in the absence of any agreement to the contrary, must return to a shipper prepaid freight where the goods do not arrive, and it would require very clear language in a contract to exempt the carrier from liability for prepaid freight where the vessel never departed upon the voyage as in the instant case.

It is immaterial and not an essential element of a shipper's case in an action to recover prepaid freight, that the shipowners were guilty of fraud in inducing the shipper to make the contract and prepay the freight.

APPEAL by the plaintiff, Charles E. McInnes & Company, Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 19th day of October, 1920, sustaining the defendant's demurrer to the plaintiff's complaint and directing a dismissal of the complaint, and also from an order entered in said clerk's office on the same day denying plaintiff's motion to overrule the demurrer to the complaint.

*Lawrence E. Brown* of counsel [*Bullowa & Bullowa*, attorneys], for the appellant.

*Winthrop W. Aldrich* of counsel [*William Dean Embree* and *Franklin P. Ferguson* with him on the brief; *Murray, Prentice & Aldrich*, attorneys], for the respondent.

SMITH, J.:

The facts alleged in the complaint are substantially as follows: On or about October 30, 1917, Bartholomew L. Stafford purchased the steamer *James S. Whitney*, and the defendant loaned \$225,000, being part of the purchase price of said steamer. In order to secure the repayment of said

loan to the defendant, Stafford transferred the legal title of said steamer to Arthur A. Miller, the treasurer of the defendant. Thereafter, Stafford and one Robert E. Miller, either in person or doing business under the name of the Acme Steamship Company, with the knowledge and consent of the defendant, operated said steamer and entered into affreightment contracts and issued bills of lading for the carriage of freight by said steamer. It is further alleged that it was understood and agreed between said Stafford and said Robert E. Miller and the defendant that until the loan had been repaid to the defendant in full the moneys received in the operation of said steamer were to be paid to the defendant to be applied by it to the payment of said loan. It is then further alleged that the said Stafford and Miller falsely reported to the plaintiff that the steamer was about to enter upon a voyage to Genoa and solicited from the plaintiff freight for carriage on said voyage, the freight being payable in advance to the defendant. The plaintiff, relying upon these representations, entered into an affreightment contract with said Stafford and Miller for the shipment of copper to Genoa by said steamer, the contract providing that the freight moneys shall be payable to the defendant; that the said representations were false and known by the said Stafford and Miller to be false when made, and were made for the purpose of inducing the plaintiff to make the contract and to advance the said freight moneys, and it is alleged that the defendant and Stafford and Miller knew that the vessel only had a coastwise license, and that the United States had refused permission for said steamer to make a voyage to Italy. It is further alleged that pursuant to the contract made, the plaintiff gave its check payable to the defendant for the sum of \$8,624.05 for the shipment of seventy tons of aluminum ingots to be shipped on said steamer and the said check was paid to the defendant and the defendant received the proceeds thereof; that the said steamer did not sail and the freight was not carried for more than a reasonable time thereafter, and that plaintiff rescinded the contract, offered back the bills of lading and demanded of the agents and of the defendant the return of the sums paid for freight.

In *Dorff v. Taya* (194 App. Div. 278) Mr. Justice PAGE

of this court, writing for a unanimous court said: "The law is well settled in this country, contrary to the English cases, that prepaid freight, in the absence of an agreement to the contrary, must be returned to the shipper if the goods do not arrive. (*Nat. Steam Nav. Co. v. Int. Paper Co.*, 241 Fed. Rep. 861, 862, and cases cited; *The Gracie D. Chambers*, 253 id. 182, 183; *affd.*, 248 U. S. 387.)" It is recognized in the cases that affreightment contracts often include a stipulation that the freight shall not be repaid in case the goods do not arrive, but such a stipulation would ordinarily be deemed to apply to the failure of the goods to arrive after the goods had once been shipped. It would require very clear language in a contract to exempt the carrier from liability to retain the freight paid where the vessel never departed upon the voyage. It is not material whether Stafford and Miller were guilty of fraud in inducing the plaintiff to make the contract and prepay this freight. There is no doubt that the plaintiff could have recovered the freight from Stafford and Miller if the freight had been paid to them. There would seem to be equal right to the plaintiff to recover the freight from the defendant when the freight was paid to the defendant under the very contract between the defendant and Stafford and Miller under which the boat was operated and this freight contract was made. With this contract requiring that these moneys should be turned over to the defendant, the defendant took them, charged with knowledge and charged with all the obligations with which Stafford and Miller would have been charged for failure of the vessel to make the voyage.

The respondent argues that a check is the same as money, that money has no earmark and that the money was received in good faith by the defendant in payment of the debt owing by Stafford and Miller to the defendant, and further, that there is no relation of agency between the mortgagor and mortgagee by which the mortgagor can charge any liability upon the mortgagee. If these claims be recognized they lose sight of the fundamental distinction which this case presents where the contract between the defendant and Stafford and Miller operating the boat required that these freight moneys should be paid to the defendant. This contract itself makes Stafford and Miller the agents of the defendant to the extent

at least that it charged the defendant with the knowledge that these moneys were freight moneys and were subject to repayment in case the voyage be not made. The case of *Calumet & Hecla Mining Co. v. Equitable Trust Co.* (186 App. Div. 330) was decided purely upon the ground that the plaintiff had not rescinded its contract so as to authorize a recovery of the freight moneys paid, either from the defendant or from Miller and Stafford. Before such a cause of action can arise the plaintiff must return or offer to return the bill of lading, which, for all that appeared in that case might already have been negotiated. In the case of *Calumet & Hecla Mining Co. v. Equitable Trust Co.*, decided by Judge HAND in the United States District Court (N. Y. L. J., Dec. 13, 1919), there was no allegation that the contracts between the defendant and Stafford and Miller required the payment to the defendant of all moneys received in the operation of the boat, which fact is the distinguishing factor in this case as charging the defendant both with notice of the manner in which these moneys were received and subjecting them to liability for the return thereof in case the voyage be not made.

The orders should be reversed, with ten dollars costs and disbursements, and the plaintiff's motion for judgment upon the pleadings should be granted, with ten dollars costs, and the defendant's motion denied, with ten dollars costs, with leave to the defendant to withdraw the demurrer and answer upon payment of costs.

CLARKE, P. J., LAUGHLIN, PAGE and MERRELL, JJ., concur.

Orders reversed, with ten dollars costs and disbursements, defendant's motion denied, with ten dollars costs, plaintiff's motion granted, with ten dollars costs, with leave to defendant to withdraw demurrer and to answer on payment of said costs.

CACELIE MABBETT, Appellant, v. ALFRED W. MABBETT,  
Respondent.

First Department, July 1, 1921.

**Husband and wife — separation — default judgment — motion to vacate judgment and open default of defendant denied where defendant desires to interpose as defense separation agreement relieving him from obligation to pay alimony or support his wife — said agreement is invalid.**

A motion to vacate a judgment in a separation action which granted the wife alimony, and to open the default of the defendant, will be denied where it is based on an alleged separation agreement between the parties, which the husband desires to set up as a defense to the separation action, and which purports to release the husband from paying any allowance or alimony for the support and maintenance of the wife at any time whatsoever, since the agreement is invalid under section 51 of the Domestic Relations Law, and would constitute no defense to the action.

APPEAL by the plaintiff, Cacelie Mabbett, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of May, 1921, vacating a judgment for separation and opening defendant's default.

*George Thoms*, for the appellant.

*John P. Everett*, for the respondent.

PAGE, J.:

The plaintiff brought an action for a judicial separation from her husband on the ground of abandonment and non-support. The defendant defaulted in appearing and pleading, and the cause was tried, resulting in a judgment of separation and for twenty dollars per week alimony. The defendant served a notice of motion "for an order vacating the judgment entered, dated March 31, 1921, and opening the default of the defendant and setting aside all proceedings had herein; and for such other and further relief as shall be just and equitable." A short-form order was entered which stated: "Upon the

App. Div. 654]

First Department, July, 1921.

foregoing papers this motion is granted upon payment all costs to date." Although in his affidavit the defendant asked to be permitted "to serve an answer to the complaint, setting up as a separate defense, the separation agreement hereto annexed and above referred to as a bar to the decree now sought to be vacated," no copy of a proposed answer was served nor did the order grant any leave to serve the same.

The separation agreement, which is attached to the moving papers, provides that the parties may live separate and apart from each other, and contains the following: "The party of the second part, the wife, agrees that the party of the first part, the husband, is hereby released from paying any allowance or alimony for her support and maintenance at any time whatsoever; and the party of the first part, the husband, shall be held by the party of the second part free from all and every debt or debts which she shall, after the day and date hereof, contract." If it was the desire of the defendant to set up this provision of the separation agreement as a bar to the maintenance of this action his motion should not have been granted. The Domestic Relations Law (§ 51) provides that a husband and wife cannot contract to relieve the husband from his liability to support his wife and such an agreement is void. (See *Gewirtz v. Gewirtz*, 189 App. Div. 483, 486.)

The defendant presents no excuse whatsoever for having suffered a judgment by default. The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ.,  
concur.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

T. J. FLETCHER JACKSON and GERTRUDE H. M. JACKSON,  
Appellants, v. EDNA GREY, Respondent, Impleaded with  
ALTA BRENNAN and Others, Defendants.

First Department, July 1, 1921.

**Landlord and tenant—summary proceedings—tenant of apartment not residing therein but subletting rooms does not occupy premises for dwelling purposes only, within meaning of Laws of 1920, chapter 942, adding to Code of Civil Procedure section 2231, subdivision 1a—such tenant may be dispossessed.**

A house is not occupied for dwelling purposes only, within the meaning of chapter 942 of the Laws of 1920, adding to Code of Civil Procedure section 2231, subdivision 1a, so as to prevent the removal of the tenant as a hold-over, where the tenant does not reside on the premises but leases them for the purpose of subletting rooms therein to third persons.

Accordingly, a tenant who leased two floors in a private house for the term of one month, and remained in possession from month to month but who did not actually reside upon the premises or enter into possession personally till after the expiration of thirty days' notice given her to quit the premises, is not protected by said statute and may be dispossessed.

APPEAL by the plaintiffs, T. J. Fletcher Jackson and another, from a determination of the Appellate Term of the Supreme Court, First Department, rendered on the 10th day of January, 1921, reversing a final order in summary proceedings of the Municipal Court of the City of New York, Borough of Manhattan, Fifth District, in favor of the plaintiffs.

*Henry S. Mansfield*, for the appellants.

*David G. Godwin*, for the respondent.

PAGE, J.:

The facts are practically admitted. The proceeding was brought to dispossess the tenant on the ground that she was holding over after the expiration of her term. On November 1, 1919, the landlord rented to the tenant the second and third floors in a private house, known as 132 West Eighty-seventh street, New York city, for the term of one month, and the tenant remained in possession from month to month until October 1, 1920, at which time the term of the tenant expired by reason of a thirty-day notice given by the landlord

to the tenant. This portion of the house was rented to the tenant for the purpose of subletting the same to roomers or lodgers. The tenant thereupon subleased portions of the premises, furnished, to four different persons as monthly tenants. The tenant did not reside upon the premises until the first day of October, when she moved in and occupied one of the rooms. This was after the expiration of her term. On behalf of the tenant it is claimed that the premises are occupied for dwelling purposes only, and that by reason of chapter 942 of the Laws of 1920 (adding to Code Civ. Proc. § 2231, subd. 1a), summary proceedings to remove her as a holdover tenant cannot be maintained.

In my opinion, the provision of the statute prohibiting the dispossession when the house is "occupied for dwelling purposes" means "where it is occupied by the tenant for such purposes;" and where the premises are leased to a tenant not for the purposes of a residence but for the purposes of a business of subleasing to others, the statute does not apply. In this case, although the subtenants were made parties, the proceeding as to them was withdrawn, and it was consented that the warrant should issue as against the tenant only. The Appellate Term in the case of *May v. Dermont* (114 Misc. Rep. 106), decided January 20, 1921, and, therefore, subsequent to the decision in this case, assumed for the purposes of that case that this was the correct interpretation of the statute, but as the tenant resided in the premises as well as rented out rooms, it was held that she could not be dispossessed.

The determination of the Appellate Term should be reversed, with costs in this court and in the Appellate Term, and the final order of the Municipal Court affirmed.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ.,  
concur.

Determination reversed, with costs and disbursements in this court and in the Appellate Term, and final order of Municipal Court affirmed.



JOHN ORBEN, Appellant, v. STATE INVESTING COMPANY,  
Respondent.

First Department, July 1, 1921.

**Negligence — action by husband to recover consequential damages for loss of services, etc., of wife — money paid to servant to do wife's work proper element of damages — appeal — exclusion of testimony not covered by bill of particulars — question cannot be passed on where bill of particulars not in printed case.**

In an action by a husband to recover consequential damages for loss of services, and for expenses incurred by reason of injuries sustained by his wife through the negligence of the defendant, the expenditure of money to pay for a servant to do the work that the plaintiff's wife had theretofore done, which she was incapacitated from doing because of the injuries she had sustained, was a proper item of damages.

The Appellate Division cannot pass upon the question whether testimony was properly excluded on the ground that it was not covered by the bill of particulars where the bill of particulars is not in the printed case on appeal.

APPEAL by the plaintiff, John Orben, from a judgment of the Supreme Court in his favor, entered in the office of the clerk of the county of New York on the 13th day of December, 1920, on the verdict of a jury for \$400, and also from an order, entered in said clerk's office on the 8th day of December, 1920, denying plaintiff's motion for a new trial made upon the minutes.

*Clifton G. A. French* of counsel [*French & French*, attorneys], for the appellant.

*Edward P. Mowton* of counsel [*Nadal, Jones & Mowton*, attorneys], for the respondent.

PAGE, J.:

The action is to recover consequential damages for loss of services and for expenses incurred for medical attention and nursing, by reason of injuries sustained by the wife of the plaintiff through the negligence of the defendant. Upon the trial the jury returned a verdict for the plaintiff in the sum of \$400. A motion to set aside the verdict, on the ground among others that it was inadequate, was denied.

The plaintiff proved that he expended for medical services two hundred and sixty-eight dollars, for nurses fifty dollars, and for medicines fifty dollars. He also testified that prior to the injury his wife had done all of the household work, and that thereafter he had to employ a servant to do the work, paying her sixty dollars a month for eight months. He was also interrogated as to the payment of other money to a maid to assist his wife. The questions did not clearly show what work this maid did or whether she was another servant hired after the first one left to do the housework, or one employed for some other service. This testimony was excluded on the ground that it was not covered by the bill of particulars. The bill of particulars is not in the printed case on appeal, and, therefore, we cannot pass upon the appellant's contention that the exclusion of this evidence was erroneous.

The expenditure of money to pay for a servant to do the work that the plaintiff's wife had theretofore done, which she was incapacitated from doing because of the injuries she had sustained, was a proper item of plaintiff's damages and should have been included in the verdict.

The judgment and order will, therefore, be reversed and a new trial ordered, with costs to the appellant to abide the event.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

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BARNET KASHDAN, Respondent, v. WILKER REALTY Co., INC., and WILLIAM H. KIRCHNER, Appellants.

First Department, July 1, 1921.

**Process — action for malicious abuse of process — issuance of final warrant in summary proceedings to dispossess.**

The gravamen of an action for the malicious abuse of process is the willful using of the process, civil or criminal, for a purpose not justified by law and to effect an object not within its proper scope.

Accordingly, there was no abuse of process by the issuance of a warrant in summary proceedings, where it appeared that the defendant herein instituted summary proceedings to dispossess the plaintiff herein; that the plaintiff appeared in said proceeding and tendered and paid into court the amount of rent prior to the increase thereof; that the plaintiff defaulted in appearing at the trial and the final order was issued in favor of the landlord but the issuance of the warrant was stayed for two weeks; that the proceeding was not discontinued or the balance of rent paid, though the plaintiff sent the defendant the increased rent for the second month but refused to pay the increase for the first month, whereupon the defendant returned the rent received for the second month.

APPEAL by the defendants, Wilker Realty Co., Inc., and another, from a judgment of the County Court of Bronx county in favor of the plaintiff, entered in the office of the clerk of the county of Bronx on the 26th day of October, 1920, upon the verdict of a jury, and also from an order, entered in said clerk's office on the 17th day of November, 1920, denying defendants' motion for a new trial made upon the minutes.

*Edgar Hirschberg*, for the appellants.

*Philip E. Uhr*, for the respondent.

PAGE, J.:

This is an action for damages for malicious abuse of process. The landlord of No. 1537 Fulton avenue raised the rent of his tenants, about thirty in number, two dollars per month from October 1, 1919. The tenants held a meeting and decided not to pay. Thereupon the landlord instituted dispossess proceedings against nineteen tenants, of whom the plaintiff was one, returnable on October 6, 1919. On October sixth the plaintiff appeared and paid into court twenty-five dollars, the amount of the rent which had been paid for the preceding month, and the case was set for trial on October 14, 1919, at which time the tenant defaulted, and final order was issued in favor of the landlord, but the issuance of the warrant was stayed until November 1, 1919.

The deposit of the twenty-five dollars in court was a concession that such amount was due, and the question to be tried was whether two dollars more was due. By granting the final order the court held that twenty-seven dollars and

not twenty-five dollars was due, as rent, which had not been paid. There is no evidence in this case that the proceeding had been discontinued, or this balance of rent paid. The warrant was issued from a court having jurisdiction, for a cause authorized by law, and was used to enforce the final order of the court which directed it to issue, namely, to remove the tenant and put the landlord in possession. There was no malicious abuse of process.

The gravamen of an action for abuse of process is the willful using of the process, civil or criminal, for a purpose not justified by law and to effect an object not within its proper scope. (*Foy v. Barry*, 87 App. Div. 291, 294, *HATCH, J.*; *Assets Collecting Co. v. Myers*, No. 1, 167 id. 133, 138, *CLARKE, J.*; *McClerg v. Vielee*, 116 id. 731, 733.)

The defendant moved at the close of the plaintiff's case and renewed the motion at the close of the entire case to dismiss upon the specific grounds that the plaintiff had failed to prove facts sufficient to constitute a cause of action, that the plaintiff had failed to establish that there had been any abuse of process, that the plaintiff had failed to establish the element of intentional wrongdoing or a wanton attempt to pervert the processes of the law from their proper use and design, and excepted to the denial of the motion. The motion should have been granted.

The plaintiff claims that he sent a money order for the November rent at the increased rate on November 7, 1919, which was Friday; that the following Tuesday the defendant called and asked for the two dollars due on the October rent, which the plaintiff refused to pay. The defendant then tendered back twenty-seven dollars, and on the plaintiff's refusal to accept it laid it on the table beside him and left. The case of *Crawford v. Waters* (46 How. Pr. 210), upon which respondent relies, was not a payment of rent for a subsequent month. But the money was paid into court for the purpose of redeeming the tenancy after forfeiture. The amount was not sufficient to cover the amount in arrears, but the landlord received the money and kept it. The court held that the tenant undertook *bona fide* to redeem the demised premises, and by accepting and retaining the amount the landlord affirmed the existence of the lease. The case is clearly dis-

tinguishable from the case at bar. The tenant concedes that he did not pay or tender the balance due on the October rent.

The judgment should be reversed, with costs to the appellant, and the complaint dismissed, with costs.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

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NICHOLAS W. RYAN, Respondent, *v.* RODGERS & HAGERTY, INC., Appellant.

First Department, July 1, 1921.

**Contracts — action to recover balance due and prospective profits on contract for construction of railroad and tunnel ducts — contract for laying tunnel ducts only — prospective profits not recoverable where contract rescinded.**

In an action to recover balance alleged to be due on a contract for the laying of railroad and tunnel ducts in a section of a subway, and for prospective profits arising from the refusal of the defendant to permit the plaintiff to complete the contract, evidence examined, and *held*, that the contract, which had been fully performed, called for the laying of the tunnel ducts only and did not include the laying of railroad ducts.

Moreover, if the contract covered both classes of ducts then on the failure of the defendant to pay the installments claimed to be due to the plaintiff, the plaintiff had one of two courses open to him, either to rescind the contract and recover what was due thereunder up to date, or to proceed with the contract and sue for the amount due; but he could not rescind the contract and recover prospective profits.

APPEAL by the defendant, Rodgers & Hagerty, Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Bronx on the 18th day of February, 1920, on the verdict of a jury.

Warren I. Lee of counsel [*Howard A. Butler* with him on the brief], for the appellant.

*Frederick J. Flynn*, for the respondent.

PAGE, J.:

The complaint stated two causes of action. In the first were really embodied two: one for the balance alleged to be due for work performed under the contract; and another for loss of profits as damage for refusal to allow the plaintiff to complete the contract. The second cause alleged was for \$50 for extra work. The jury gave a verdict for plaintiff for \$342.78, the amount alleged to be due for work performed, \$380 for loss of profits, and \$30 for extra work, making a total of \$752.78.

The defendant had the contract for building a section of the subway along Eastern Parkway in Brooklyn. This contract provided for two classes of ducts as follows:

" SUBDIVISION 20 RAILROAD AND TUNNEL DUCTS

" Section No. 397. The ducts to contain cables for transmitting electricity for the operation of the Railroad shall be of the one-way form with circular holes.

" Tunnel ducts are those incorporated in the Railroad structure. All other ducts for use in connection with the Railroad are termed Railroad ducts."

Section No. 407 of the contract provides: " Railroad ducts will be paid for per duct foot in place and measured in place at the price stipulated for Railroad ducts in Schedule Item 18-A, and Tunnel ducts shall be paid for per duct foot in place at the price stipulated for Tunnel ducts in Schedule Item 18." These schedules are not printed in the record.

The difference between tunnel ducts and railroad ducts was in the method of installation. The tunnel ducts were laid in the bottom of the structure and alongside the walls in banks of twenty. The railroad ducts were laid above the roof of the structure, after a portion of the cut had been refilled.

The defendant was to be paid monthly on the certificate of the engineer of the amount of the work done and materials incorporated in the work, ten or fifteen per cent of the amount to be withheld.

The plaintiff made a subcontract with the defendant. The parts material to this appeal are as follows: " I propose to do the work of handling, laying and rodding of the tunnel ducts on subway Section 3, Route 12, on Eastern Parkway,

Brooklyn, in accordance with the plans and specifications of the Public Service Commission, for the sum of two and three-quarter cents ( $2\frac{3}{4}$ c) per duct foot. Rodgers & Hagerty, Inc., to furnish all materials. \* \* \* The ducts will be delivered to me along the line of the work on trucks; I to unload and stack and do all further handling into place. \* \* \* I will agree to do the rodding of all ducts according to the specifications and have the same passed by the Engineer. For this I agree that the Contractor shall withhold one-half cent per duct foot, paying the same to me at the time of the final acceptance of the ducts by the Public Service Commission's engineer. \* \* \* Payments to be made monthly as Rodgers & Hagerty, Inc., are paid." This contract, dated April 10, 1917, was signed by the plaintiff and accepted by the defendant, and the day after it was signed the plaintiff commenced work.

The plaintiff testified that three or four days after he commenced work he saw the defendant's president and had the following conversation: "I told him I could not wait for the one-half cent that the contract called for until he got his final payment from the city, and he told me I would not have to wait for it, and that as soon as they were rodded and accepted he would pay me, and he did. \* \* \* I asked him, if I needed it, if he would give me money at any time that I might need it for a payroll, and he said he would, and he did give it to me."

He testified further that he had his contract with him and asked Hagerty to modify it in writing, but the latter said it would not be necessary. This is a different modification from that set forth in the complaint, which is as follows:

"*Fifth.* That after the plaintiff entered upon the performance of said contract and work and to enable the plaintiff to more readily finance and carry on said work, it was mutually agreed between the defendant and the plaintiff that the defendant would pay the plaintiff for said work at the rate of  $2\frac{3}{4}$  cents per duct foot in weekly installments for the work performed each week irrespective of the time or manner in which defendant was to be paid by the City of New York; and it was further agreed by the defendant with the plaintiff that the defendant would not retain any percentage of the

sums thus to become payable but on the contrary would make said payments without retaining any percentage thereof and without waiting until the final acceptance of the ducts by the Public Service Commission's Engineer."

Mr. Hagerty's version of this transaction was that the plaintiff came to him three or four weeks after he commenced work and asked him to advance his payment, as he had been disappointed in collecting certain promissory notes that were due him, and did not have sufficient money to meet his payroll, and that Hagerty ordered his engineer to measure the work and a payment of \$256.50 was made on May fourth, which was for the ducts laid up to that time at two and three-quarters cents a foot less one-half cent. This payment would seem to corroborate Hagerty's version of the conversation. It was made in less than a month, and the one-half cent was deducted. Hagerty testified that plaintiff was continually coming to him with requests for payments to meet his payroll and he granted his requests. The remaining payments were made May twenty-fifth, \$542.25; May thirty-first, \$423; June sixteenth, \$852.75; June thirtieth, \$648; July ninth, \$666; July twenty-fourth, \$832.50; August eleventh, \$681.50; August twenty-ninth, \$1,096; October fourth, \$1,278.23; November fifth, \$1,603.17; a total of \$8,879.90. At this time the tunnel ducts were all substantially constructed and they were finished in November. There had been laid 335,370 feet of duct which was all of the tunnel duct that was to be laid. At two and three-quarters cents per foot this would amount to \$9,222.68, leaving a balance due of \$342.78.

The defendant requested the plaintiff to proceed with the work of unloading ducts which were about to be delivered to lay the railroad ducts. The plaintiff refused to do it until and unless a check was sent for the balance due, to which the defendant replied that the plaintiff had been advanced \$1,328.08 over and above what was due on the contract, this being the difference between the amount that could have been withheld at the rate of one-half cent per duct foot and the amount still unpaid. The defendant also wrote demanding that the plaintiff proceed with the work within twenty-four hours or it would complete his contract and hold



him for the difference. A bill was thereafter sent to him for the labor of unloading the ducts. Hagerty testified that the plaintiff told him that his contract did not require him to lay the railroad ducts, but only the tunnel ducts, and that he then examined the contract and found that his contention was correct, and ordered the bill that had been sent for unloading the ducts canceled and payment of the balance made. An offer was made to pay the balance, and a general release demanded. Plaintiff refused.

In my opinion the plaintiff has no cause of action for the profits:

*First.* His contract only called for the laying of the tunnel ducts, which had been fully performed.

*Second.* Even if we adopt the plaintiff's version that his contract covered all the ducts, then on the failure of the defendant to pay the installment claimed to be due he had one of two courses open to him, either to rescind the contract and recover what was due thereunder up to date, or proceed with the contract and sue for the amount due; but he could not rescind the contract and recover prospective profits. (*Wharton & Co. v. Winch*, 140 N. Y. 287, 293; *Moore v. Taylor*, 42 Hun, 45; *Jones v. City of New York*, 47 App. Div. 39, 40.)

I am of opinion that the plaintiff was entitled to recover the balance due and also for the extra work, but the judgment should be reduced by \$380, the sum awarded for prospective profits, and as thus modified affirmed, with costs to the appellant.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Judgment modified by reducing the amount thereof as entered to the sum of \$497.53, and as so modified affirmed, with costs to appellant.

In the Matter of the Application of CENTRAL UNION TRUST COMPANY OF NEW YORK, Respondent, as Trustee under the Will of LAURA A. DELANO, Deceased, etc., for Leave to Sell Certain Real Estate, Pursuant to Sections 105 and 107 of the Real Property Law.

FREDERICK W. BISGOOD, Guardian ad Litem of JULIA CHANLER, and Others, and EGERTON L. WINTHROP, JR., Guardian ad Litem of CHRISTOPHER TEMPLE EMMET, JR., and Others, Appellants.

First Department, July 8, 1921.

**Trusts — sale of real property by trustee — Real Property Law, §§ 105 and 107, construed and applied — agreement for sale of property should not be confirmed where at time of application to court property has materially increased in value — court concerned with interests of cestui que trustent only.**

Sections 105 and 107 of the Real Property Law in relation to the sale of real property by a trustee contemplate an application to sell for the specific reasons named in the statute, and the granting of the final order authorizing the sale upon terms and conditions named. The application authorized is not an application to sell to a particular individual, but a general application to sell and an agreement with a purchaser subject to the confirmation of the court is contemplated to be made after the final order provided a purchaser can be found who will purchase the property upon the terms prescribed therein.

The order of the court authorizing and directing the sale must be made in view of the conditions existing at the date of the order and cannot be affected by any prior agreement which may have been made between the trustee and a willing purchaser.

Accordingly, a contract by a trustee for the sale of trust property at \$160,000 should not be confirmed on an application to sell the property where it is made to appear at the time of the application that the property has increased in value and is then worth \$200,000.

On an application for the sale of trust property the court is not concerned with the interests of any purchaser but only with the interests of the *cestuis que trustent*.

**APPEAL** by Frederick W. Bisgood and another from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of March, 1921, authorizing, empowering and directing the Central Union Trust Company,

as substituted trustee under the will of Laura A. Delano, deceased, to sell property of the estate for the sum of \$160,000.

*Egerton L. Winthrop, Jr.*, guardian *ad litem*, for the appellants Christopher T. Emmet, Jr., and others.

*Frederick W. Bisgood*, guardian *ad litem*, for the appellants Julia Chanler and others.

*Wolcott P. Robbins* of counsel [*James Gore King* with him on the brief; *Miller, King, Lane & Trafford*, attorneys], for the respondent.

*Charles A. Runk* of counsel [*Seibert, Paddock & Cochran*, attorneys], for the Harris Company, Inc.

SMITH, J.:

In the case instant there was no power of sale given by the will. The application was, therefore, made by the substituted trustee for leave to sell real property belonging to the estate situated upon Broadway in the borough of Manhattan. On September 12, 1919, this trustee entered into an agreement with one Abraham Harris for the sale to him of said premises for \$160,000. It was provided in the contract, however, that the agreement was entered into by the seller, subject to its first obtaining leave of the Supreme Court to make this sale and to deliver the deed hereinafter mentioned and that in the event of any delay in procuring said leave extending beyond the time for the delivery of the deed as thereinafter mentioned, the seller should be entitled to such reasonable adjournment of the time of closing as would cover said delay, and such adjournment should not prejudice the seller as respects payment of the taxes of 1919, second half, which taxes, if then a lien, should be borne by the purchaser. The parties interested in this application as beneficiaries and remaindermen were very numerous. Many of them resided in other States and foreign countries and many of them were infants, and eight months elapsed from the time of the signing of the agreement and the filing of the application with notice thereof to all the interested parties on or about May 19, 1920. The application was referred to a referee to take

evidence and report to the court. In the report made it was found that at the time the contract was made with Harris the property was worth \$160,000, but that at the time application was made for the confirmation of the report and the direction for the sale, the property was worth \$200,000. The referee, therefore, reported that in his judgment the application should not be granted, as the contract was made subject to confirmation, and at the time of the application for confirmation the property was worth considerably more than the contract price. This conclusion of the referee was overruled by the Special Term, which held that, inasmuch as the price named in the agreement was a fair value of the property at the time the contract was made, the purchaser was entitled to the confirmation of the sale, notwithstanding the fact that its value had, in the meantime, and before the application for confirmation, increased about twenty-five per cent in value. (114 Misc. Rep. 214.)

This application was made to the court under sections 105 and 107 of the Real Property Law. Under section 105 (as amd. by Laws of 1918, chap. 403) the Supreme Court may, upon such terms and conditions as seem just and proper, authorize any trustee to mortgage or sell real property, or any part thereof, "whenever it appears to the satisfaction of the court that said real property, or some portion thereof, has become so unproductive that it is for the best interest of such estate \* \* \* or that for other peculiar reasons, or on account of other peculiar circumstances, it is for the best interest of said estate." By section 107 (as amd. by Laws of 1918, chap. 578, and Laws of 1920, chap. 639) the procedure is specified. The application must be by petition duly verified which shall set forth the condition of the trust estate and the particular facts which make it necessary or proper that the application should be granted. It is then provided: "After taking proof of the facts, either before the court or a referee, and hearing the parties and fully examining into the matter, the court must make a final order upon the application. In case the application is granted, the final order must authorize the real property affected by the trust or some portion thereof, to be mortgaged, sold or leased, upon such terms and conditions as the court may prescribe. \* \* \* Before a mort-

gage, sale or lease can be made pursuant to the final order, the trustee must enter into an agreement therefor, subject to the approval of the court and must report the agreement to the court under oath. Upon the confirmation thereof, by order of the court he must execute as directed by the court a mortgage, deed or lease." It is then provided that a mortgage, conveyance or lease made pursuant to such final order shall be binding upon all parties interested. This statute seems to contemplate an application to sell for the specific reasons named in the statute, and the granting of the final order authorizing the sale upon terms and conditions named. It will be noticed that the application authorized is not an application to sell to a particular individual, but a general application to sell and an agreement with a purchaser subject to the confirmation of the court is contemplated to be made after the final order provided a purchaser can be found who will purchase the property upon the terms prescribed therein.

The fact that this contract was made before the application to sell can give to the purchaser no greater rights than he would have if the agreement had been made as contemplated by the statute after the final order for sale, and the order of the court therefor, authorizing and directing the sale must be made in view of the conditions existing at the time the order is made and cannot be affected by any agreement which may have been made between the trustee and a willing purchaser prior to the time that the final order is made. In this case the finding of fact is that the property was worth \$200,000. As against this finding we think that the court improperly approved the contract and ordered the sale at the sum of \$160,000. It is the interest of the *cestuis que trustent* with which the court is concerned and not the interest of the anxious purchaser. This is clearly shown by the proceedings contemplated by the statute for the making of the final order fixing the terms and conditions of the sale prior to the contract of sale which must afterwards be approved by the court.

The case of *Wilber v. Wilber* (119 App. Div. 740) is clearly distinguishable in principle from this case. The question there arose upon a receiver's sale, wherein the interests of

infants or the *cestuis que trustent* were not involved, and wherein the parties interested, being of full age, had full opportunity to protect themselves by appearing upon the sale and bidding upon the property to the extent of its full value. In such a case it may well be held that a subsequent offer of a higher price should not be considered.

With the finding of the referee and court that the interests of the estate and of the *cestuis que trustent* require a sale of the property, we are not inclined to differ. None of the parties question this conclusion. The order should be modified authorizing and directing the sale for the sum of \$200,000, and directing the trustee to enter into an agreement for the sale of the property at that price, which agreement, when made, must be submitted to the court for its approval. As modified, the order should be affirmed, with costs to appellants from the estate to be adjudged upon the final settlement of this order, which may be settled upon notice.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ.,  
concur.

Order modified as directed in opinion, and as so modified affirmed, with costs to appellants payable out of the estate. Settle order on notice.

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THE PARK & POLLARD COMPANY, Respondent, v. THE INDUSTRIAL FIRE INSURANCE COMPANY OF AKRON, OHIO, Appellant.

First Department, July 8, 1921.

**Insurance — fire insurance — action on policy — failure to perform condition that renewal policy in another company should be surrendered and canceled constitutes defense — counterclaim — equitable counterclaim sufficient — limitation of action — time between commencement of action in Federal court and dismissal for want of jurisdiction not counted — time action restrained by injunction not counted.**

The defendant in an action on a fire insurance policy is entitled to set up as a defense to the action that the policy was given to the plaintiff upon condition that a renewal policy in another company which was in part

reinsured by the defendant, would be surrendered and canceled, and that said policy had never been surrendered or canceled.

A counterclaim based upon the same facts as were alleged in the defense with the additional fact that the premium upon the policy had been tendered to the plaintiff, which the plaintiff refused to receive, and which asks the aid of equity to rescind the contract upon the tender of the amount received for premium and upon the facts substantially alleged in the defense, is not subject to demurrer, though the defense contained a denial broad enough to include the denial that the premium was ever paid, since there is some doubt as to the right of the defendant to defend without showing that the tender of the premium has been kept good, whereas the contract may be rescinded under the counterclaim though the tender has not been kept good, if it appears that the defendant is ready, able and willing to pay the money in case the rescission is decreed. The time between the commencement of an action on the policy in the Federal court and the dismissal thereof for want of jurisdiction is no part of the time limited by the Statute of Limitations, and likewise the fact that this action was not brought within one year after the dismissal by the Federal court is excused by the injunction staying the prosecution of the action.

**APPEAL** by the defendant, The Industrial Fire Insurance Company of Akron, Ohio, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 9th day of April, 1921, sustaining plaintiff's demurrer to the second defense in defendant's answer as insufficient in law, and also the demurrer to the defendant's counterclaim.

*Robert Kelly Prentice* of counsel [*Prentice & Townsend*, attorneys], for the appellant.

*Joseph Thurlow Weed* of counsel [*William Otis Badger, Jr.*, attorney], for the respondent.

**SMITH, J.:**

This action is brought upon a policy of fire insurance. It seems that the plaintiff had a policy of fire insurance in the Stuyvesant Insurance Company for the sum of \$11,000. Part of this insurance was reinsured by this defendant. This insurance policy was renewed by the Stuyvesant Fire Insurance Company. Thereafter the agent of the plaintiff came to the defendant and asked for a policy in this defendant company. This defendant informed the agent of the renewal by the Stuyvesant Company and its interest in this renewal as a

reinsurer, and it was thereupon agreed that this policy would be given upon condition that the renewal policy in the Stuyvesant Insurance Company would be surrendered and canceled. It is alleged that that Stuyvesant Insurance Company policy never was surrendered and, therefore, that the condition precedent to the liability of the defendant has never been performed and the defendant is entitled to set this up as a defense to the action, and this I think is true. The order sustaining the plaintiff's demurrer to the second affirmative defense was error and should be reversed.

As to the order overruling the counterclaim a somewhat different question is presented. The counterclaim is based upon the same facts as are alleged in the second defense and the additional fact that the premium upon the policy has been tendered to the plaintiff, which the plaintiff has refused to receive. The counterclaim does not assert in so many words that the contract has been rescinded, but asks the aid of equity to rescind the contract upon the tender of the amount received for premium and upon the facts substantially alleged in the second defense. In the second defense, however, is the denial, which is broad enough to include the denial that the premium was ever paid. This denial did not appear in the counterclaim as asserted. It may be that in order to defend this action on the ground of the tender of the premium paid, the tender would have to be kept good. In an affirmative action to rescind, however, the allegation of a tender, with an allegation of readiness to pay the money in case a rescission is decreed, would seem to be sufficient. If there be any doubt as to the rights of the defendant to assert this as a defense to the action, the defendant is entitled to assert this counterclaim also upon the facts alleged, that the whole issue may be presented to the court. Upon a demurrer to the counterclaim, therefore, the court will not leave the defendant to a defense which may possibly be inadequate. The order, therefore, sustaining the demurrer to the counterclaim should also be reversed and the demurrer overruled. These questions were not raised in the case of *Insurance Co. of Pennsylvania v. Park & Pollard Co.* (190 App. Div. 388). That case was decided upon two grounds, first, for the lack of privity between the



plaintiff in that action who was merely a reinsurer, and this plaintiff, who was there the defendant. It was also stated in the opinion that the plaintiff in that action, as well as the defendant in this action, has an adequate remedy at law in defending an action brought for the policy. The facts in relation to the tender as asserted in this counterclaim, however, did not appear in that case, so that the question here presented differs from the question there decided.

There is a further claim in this case and that is that this demurrer searches the pleadings and the complaint does not state facts sufficient to constitute a cause of action, in that the complaint shows upon its face that the Statute of Limitations is a good defense, which statute, as contained in the policy, is asserted in the defendant's answer. In this I do not agree. The action was brought in the United States court by this plaintiff against this defendant upon this policy. This was dismissed for want of jurisdiction. In *Gaines v. City of New York* (215 N. Y. 541) it was held by the Court of Appeals, where an action was brought in the City Court which had no jurisdiction, that, nevertheless, the case came within section 405 of the Code of Civil Procedure, and under the reasoning of that case I think that *Solomon v. Bennett* (62 App. Div. 56) must be deemed to be overruled. I think, therefore, that such time was properly taken out and that the Statute of Limitations was extended for one year after the action was terminated in the United States court. The action was not brought within one year after by reason of the injunction which was granted which confessedly should be taken out of the time, so that I think the action was brought within the proper time.

The order should be reversed, with ten dollars costs and disbursements, and the demurrers overruled, with ten dollars costs, with leave to plaintiff to reply to counterclaim in twenty days upon payment of such costs.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ.,  
concur.

Order reversed, with ten dollars costs and disbursements, and demurrers overruled, with ten dollars costs, with leave to plaintiff to reply to counterclaim on payment of said costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
WILLIAM KUPPERSCHMIDT, Appellant.

First Department, July 8, 1921.

**Crimes — criminally receiving stolen property — thief not accomplice of person receiving stolen property where theft not induced by latter — corroboration of testimony of thief not necessary.**

On a prosecution for criminally receiving stolen property, the thief who stole the property is not an accomplice of the defendant where the stealing of the goods was not induced or procured by the defendant, and hence the testimony of the thief against the defendant does not require corroboration.

APPEAL by the defendant, William Kupperschmidt, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered on the 16th day of April, 1920, convicting him of the crime of criminally receiving stolen property in the first degree in violation of section 1308 of the Penal Law. (See Laws of 1916, chap. 366, amdg. said § 1308. Since amd. by Laws of 1920, chap. 570.)

*George Z. Medalie* of counsel [*Kopp & Perlman*, attorneys], for the appellant.

*Robert S. Johnstone*, Assistant District Attorney, of counsel [*Felix C. Benvenega* with him on the brief; *Edward Swann*, District Attorney], for the respondent.

SMITH, J.:

The defendant was convicted in part upon the testimony of the thief who stole the goods, and the trial judge charged the jury that the thief was not an accomplice of the defendant and that, therefore, they might convict upon the testimony of the thief without further corroboration, warning the jury, however, that they should accept with caution the testimony of one who was before them confessing his guilt. This charge raises the only question for our consideration. It has been held in this State that a thief is not an accomplice of the receiver in the crime of receiving stolen goods. (*People v. Cook*, 5 Park. Cr. Rep. 351; *People v. Ammon*, 92 App. Div.

205; *affd.*, 179 N. Y. 540; *People v. Levine*, 140 App. Div. 910.) And there are obiter expressions to the same effect. (*People v. Zimmer*, 174 App. Div. 470; *People v. Hyde*, 156 id. 628.) In the Third and Fourth Departments, however, it has been held that the thief is an accomplice of the receiver of the stolen goods. (See *People v. Willard*, 159 App. Div. 19; *People v. Markus*, 168 id. 184; *People v. Kudon*, 173 id. 342; *People v. Ansteth*, 84 Misc. Rep. 356.)

In other States we find authority divided. In Arizona, Colorado, Georgia, Indiana, Iowa, Minnesota, Missouri, New Jersey, Oklahoma, Oregon, Tennessee and Utah the law seems to be established that the thief is not an accomplice of the receiver of stolen goods so as to require corroboration of his testimony as against the receiver. The contrary rule seems to have been held in Arkansas, California, Illinois, Kansas, Pennsylvania and Texas.

The cases in the Third and Fourth Departments holding that the thief is an accomplice of the receiver of stolen goods contain no discussion of the question but rather an assumption of the rule of law and the discussion is confined to the sufficiency of the corroboration. Upon an examination of the authorities and upon a consideration of the logical results of such a holding, I am led to the conviction that the authorities in the Third and Fourth Departments are not well founded, and that the thief is not an accomplice of the receiver of stolen goods, so that his testimony as against such receiver does not require corroboration within the requirements of the criminal law. It is difficult, if not impossible, to lay down any guiding principle which will apply to all cases in determining what is an accomplice within this provision of section 399 of the Code of Criminal Procedure. In this case, however, the conclusion is simplified by the nature of the crime. The thief may sell the goods to an innocent purchaser and the purchaser is guilty of no crime. If the sale be made to a party who has knowledge of the fact that the goods are stolen, the purchaser is guilty of a crime. To hold that the thief is an accomplice in the crime of criminally receiving if the purchaser has knowledge of the theft, and that no such crime is committed either by the purchaser or the thief in the sale of such goods if the thief does not know that

the purchaser had knowledge of the theft, makes the criminality of the thief in such crime dependent solely *upon his knowledge of the knowledge* of the purchaser that the goods have been stolen. I know of no principle of the common law and of no statute which makes the test of criminality the knowledge of facts by a third party. If the thief is not guilty of a crime in making a sale to an innocent third party, he cannot be guilty of a crime in making the sale to a third party with notice of the fact that the goods were stolen. One act is morally as culpable as the other. Where the act is one that is made criminal solely by the knowledge of the receiver of the goods, I cannot see by any reasonable rule of law how the thief can become an accomplice in the crime which depends upon such knowledge.

The judgment should be affirmed.

DOWLING, J., concurs.

PAGE, J.:

I concur in the result of Mr. Justice SMITH's opinion. In my opinion the thief is not the accomplice of the receiver of the goods stolen, except where the stealing of the particular goods is induced or procured by the receiver, in which as the main purpose of the theft is to dispose of the particular goods to the receiver, and it is through his incitement and inducement that the theft is committed, they are both united in a common plan to steal goods for the purpose of disposing of them to the receiver; and, therefore, I am of opinion that not alone would the receiver be the accomplice of the thief in the larceny, but the thief would be the accomplice in the receiving.

In the case under consideration the receiver merely advertised his business by telling the thief that if he had goods to dispose of he would take them from him. There was no inducement to the particular theft. The evidence tended to show the guilty knowledge of the receiver, and no corroboration was necessary of the thief's testimony.

CLARKE, P. J., and GREENBAUM, J., concur.

Judgment affirmed.

ANNIE BELLEVILLE HUNTER, Respondent, v. FREDERICK  
WILLIAM HUNTER, Defendant.

Upon Motion of WILLIAM R. POWELL and SARAH E. HUNTER, as  
Executors, etc., of FREDERICK WILLIAM HUNTER, Deceased,  
as Substituted Defendants, Appellants, for an Order Modi-  
fying the Final Judgment Herein.

First Department, July 8, 1921.

**Husband and wife — divorce — effect of death of husband pending motion to modify judgment to strike out alimony provision — substitution of executors of husband as defendants for purposes of motion — court has power to impose upon defeated party attorney and counsel fees and other expenses where order for reference entered by consent provided for payment thereof.**

The death of a defendant in divorce proceedings after the rendition of judgment makes inoperative the provision for the payment of alimony after that date, but does not otherwise destroy the force of the judgment. Accordingly, any question as to the liability to pay alimony after the remarriage of the wife may be passed on by the court after the death of the husband on a motion instituted prior thereto for the purpose of relieving him from the alimony provision in the decree of divorce.

The executors of the husband having been substituted as defendants on their own motion they cannot be heard to contend that the court was without jurisdiction thereafter to revive or entertain the motion then pending for the amendment of the alimony provision in the judgment for divorce and, furthermore, the court properly exercised its powers in reviving the motion, substituting the executors and continuing the proceeding.

The court had the power to impose upon the defeated party to the motion the expenses of the reference ordered to take testimony and to report and also the attorney and counsel fees of the wife, since the order for the reference was entered by consent and provided that the expenses including the fees for the referee be taxable against the party against whom the motion should be decided; the provisions of section 3251 of the Code of Civil Procedure limiting the court to ten dollars costs and necessary disbursements for printing and referee's fees was not controlling.

The term "expenses" in the order of reference was understood and intended by the justice and by the respective attorneys for the parties to include, among other things, the reasonable attorney and counsel fees incurred by the successful party in connection with the reference.

Inasmuch as the court has found that the affidavit upon which the motion for a modification of the judgment for divorce was based, which was to the effect that the plaintiff in the divorce action had remarried, was

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First Department, July, 1921.

wholly false, and that the husband induced and permitted the affiant to repeat under oath before the referee the false statements contained in the affidavit, it is proper that the entire expense that the plaintiff incurred to meet and overcome the perjury suborned by the husband should be repaid by him or his executors.

The effect of the order entered on the motion of the executors which provided for their substitution and the continuance of the motion and that it should be without prejudice to any of the proceedings already had upon said motion or in the action, and that all proceedings that might thereafter be had should be binding upon the plaintiff and upon the executors, was to require the personal representatives of the defendant to make pecuniary reparation out of the husband's estate for the expenses actually incurred by reason of his wrongful act.

APPEAL by William R. Powell and another from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of June, 1920, denying a motion to modify so much of a judgment of divorce as awarded alimony to the plaintiff.

*Carlisle Norwood* of counsel [*Thomas L. Walsh* with him on the brief], for the appellants.

*Henry L. Sherman* of counsel [*George H. Engelhard* with him on the brief; *Engelhard, Pollak, Pitcher & Stern*, attorneys], for the respondent.

PAGE, J.:

On or about November 25, 1916, the plaintiff obtained a final judgment of divorce in her favor and against the original defendant, Frederick William Hunter, now deceased, in an action brought in the Supreme Court, New York county, which also adjudged that Frederick William Hunter pay to the plaintiff alimony in the sum of \$5,200 per annum, to be computed from the date of entry of the judgment, to be paid in equal monthly installments during the natural life of the plaintiff. Hunter paid to plaintiff the alimony down to and including the installments which became due January 6, 1918.

On or about February 23, 1918, Frederick William Hunter made a motion for an order modifying the final judgment by annulling the provision for alimony pursuant to section 1771 of the Code of Civil Procedure, upon the ground that the plaintiff had married one John Barrett Kerfoot at Perry,

Taylor county, Fla., on February 1, 1917. In support of the motion Hunter submitted the affidavit of John O. Culpepper, the county judge of Taylor county, Fla., stating that he had married the plaintiff and Kerfoot on February 1, 1917. Attached to the affidavit were photographic copies of the marriage license and the certificate of marriage, and a photograph of the marriage record book, a page of which constituted the license, the certificate of marriage, and the record thereof, all in the handwriting of Culpepper, in whose custody was the book. Culpepper also stated that he had visited Freehold, N. J., and recognized Kerfoot and the plaintiff as the persons whom he had married.

In opposition the plaintiff presented her affidavit and that of Kerfoot denying the marriage and stating that they were not in Florida at the time mentioned and giving detailed circumstances tending to prove their presence in New York and New Jersey on the three or four days preceding, and the same number succeeding February 1, 1917; and she presented also affidavits of a number of persons corroborating them.

Upon this conflict of statement the justice at Special Term appointed a referee to take the proofs of the parties and of their witnesses with respect to the question whether the plaintiff was married to Kerfoot at Perry, Taylor county, Fla., on February 1, 1917, and upon the further question whether any perjury had been committed or imposition practiced upon the court by any of the parties or any person acting in their behalf, and to report the evidence to the justice with his opinion. The order further directed each of the parties at his or her own expense respectively to produce for oral examination and cross-examination before said referee each of the individuals whose affidavits were recited in the order. It also provided, "that the expenses of said reference, including the fees for the referee and of his stenographer be taxable as part of the costs of this motion against the party against whom said motion shall be decided." Voluminous testimony was offered before the referee. After both sides had concluded, but before the report was made, Frederick William Hunter died, and letters testamentary were issued on May 12, 1919, to William R. Powell and Sarah E. Hunter. On the consent of the attorneys for both parties, and on

motion of the attorneys for the personal representatives of Frederick W. Hunter, an order was entered as follows:

"That the motion above mentioned for an order modifying the final judgment herein by annulling the provisions of said final judgment directing the payment of money for the support of the plaintiff and the aforesaid proceeding arising thereupon be continued in the names of Sarah E. Hunter as Executrix and William R. Powell as Executor of the last will and testament of Frederick William Hunter, and that the said Executrix and Executor, for the purpose of said motion be substituted as defendants in the place and stead of said Frederick William Hunter, deceased; it is further

"Ordered, that such substitution and continuance be without prejudice to any of the proceedings already had upon said motion or in this action, and that all such proceedings that may hereafter be had upon said motion, shall be binding upon the plaintiff and upon the said Executrix and Executor respectively, or inure to the benefit of the respective parties as the case may be, as if said motion had originally been made by said Executrix and Executor."

The referee thereafter filed his report in which he was of opinion that the plaintiff was not married to Kerfoot and that the license, marriage certificate and record thereof were fabrications of Culpepper and that Culpepper swore falsely in the affidavit submitted to the court and in his testimony given at the reference. The motion was thereupon brought on before the justice, who adopted the conclusions of the referee and embodied them in the order. He also found that Frederick William Hunter at the time of his death was indebted to the plaintiff in the sum of \$5,633.29, and that the expenses of the reference reasonably and necessarily incurred and paid by the plaintiff upon the reference amounted to \$6,650.05, and that in addition to the expenses paid the plaintiff had incurred \$15,255 for fees and disbursements for her attorney and \$15,000 fees for counsel; and the court directed that \$36,945.05 be taxed as a part of the costs of the motion.

The personal representatives of Frederick William Hunter appeal from the order and each and every part thereof. The record does not contain any of the evidence before the referee,



and the order is attacked upon the appeal upon two grounds. The first is that upon the death of Frederick William Hunter the life of the judgment expired; that at that time the alimony then due was a fixed and judicial debt of record which could be enforced by the plaintiff against the estate; and that the court was without jurisdiction thereafter to revive or entertain the motion then pending for the amendment of the alimony provisions in the judgment of divorce.

The death of the defendant rendered inoperative the provisions for the payment of alimony after that date. The judgment itself did not "expire." It was in full force and vigor except as to future alimony. It fixed the amount of alimony to be paid, but did not determine what amount was unpaid; and a question as to the liability to pay alimony after the marriage of the wife, if it had been determined upon the motion that she had married, was open for judicial determination, whether her right ceased on the date of the marriage, on the date of the motion, or on the date of the entry of the order. All these questions the executors desired to have determined, we must assume, for it was on their motion that the order was entered reviving the motion and the proceedings thereunder and substituting them in place of the defendant. The time for them to take the position that there was nothing further to litigate and that the unpaid alimony had become a fixed debt for which they were liable, was at the time when they elected to continue the controversy. Having made the election, they cannot afterward repudiate their act and take an inconsistent position. Furthermore, large expenses had been incurred upon the reference, liability for the payment of which was to be determined by the result of the motion. If the proof had established the marriage, then the expenses paid by the defendant would have been directed to be paid by the plaintiff; otherwise the amount of the plaintiff's expenses became a debt of the estate which the executors would have to satisfy. The court properly exercised its powers in reviving the motion, substituting the executors, and continuing the proceeding.

*Second*, the appellants contend (a) that the court had no power to impose upon the defeated party any expenses of the motion other than the costs and disbursements allowed by

section 3251 of the Code of Civil Procedure; and (b) that it could not construe attorney and counsel fees as a part of the expenses of the reference directed to be paid.

(A) The order appointing the referee and providing for the payment of the expenses by the defeated party recites that it was entered on consent. If it had not been consented to the court would have been limited to imposing ten dollars costs and necessary disbursements for printing and referee's fees, as provided in section 3251. By consent the parties can agree that other expenses shall be included. If the order was not entered on consent the parties should have moved to resettle it. Having accepted it and acted under it, they may not now question its provisions.

(B) The court, in the order from which the appeal is taken, recited that the order of reference was made at the request of both parties when it appeared that the affidavits presented by one or the other must be false; and that the term "expenses" in the order of reference was understood and intended by the justice and by the respective attorneys for the parties to include, and by the court was now construed as including, among other things, the reasonable attorney and counsel fees incurred by the successful party in connection with said reference. And as evidence of said understanding on the part of the defendant's attorney he recited the fact that on the settlement of the order of reference they presented a proposed order providing for the payment of the "expenses of the reference other than attorney and counsel fees," which order he refused to sign, thereby showing that it was the intention of the court that such fees were included in the term "expenses;" and the further fact that the defendant did not move to resettle the order or otherwise challenge it, but proceeded with the reference.

The court has found that the affidavit upon which the motion was based was wholly false, and that the defendant induced and permitted the affiant to repeat under oath before the referee the false statements contained in the affidavit. It is, therefore, fit and proper that the entire expense that the plaintiff incurred to meet and overcome the perjury suborned by the defendant should be repaid by the defendant. Had Frederick William Hunter survived there could be no

question of the propriety of this requirement in the order, and the court would have been justified in imposing even more drastic terms. The order entered on motion of his personal representatives provided that their substitution and the continuance of the motion should "be without prejudice to any of the proceedings already had upon said motion or in this action, and that all such proceedings that may hereafter be had upon said motion, shall be binding upon the plaintiff and upon the said Executrix and Executor respectively, or inure to the benefit of the respective parties as the case may be, as if said motion had originally been made by said Executrix and Executor."

The effect of this portion of the order is to require the personal representatives of the defendant to make pecuniary reparation out of his estate for the expenses actually incurred by reason of his wrongful act.

In my opinion the order was right and should be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ., concur.

Order affirmed, with ten dollars costs and disbursements.

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ROBERT ANKELE, Appellant, v. GEORGE BLANKNER, as Executor, etc., of ALICE L. ANKELE, Deceased, and Others, Respondents.

First Department, July 8, 1921.

**Pleadings**—separate defense must be treated on demurrer as entirely separate and distinct part of answer—equity—suit against executor to compel conveyance of interest in real property and for accounting of rents and income received—agreement by testator for conveyance not in writing—complaint does not set forth agreement which can be specifically enforced—resulting trust not shown—when court of equity will not override Statute of Frauds.

Matter pleaded as a separate and complete defense must, for the purposes of a demurrer thereto, be treated as an entirely separate and distinct part of the answer, and the defendant is not entitled to the benefit of any

denials contained in any other part of the answer, which are not repeated by reference or otherwise incorporated into the separate defense.

In a suit to compel the conveyance to the plaintiff of a two-thirds interest in certain property and for an accounting for all income derived therefrom the plaintiff alleged in his complaint that the property in question was transferred by him to his wife, defendant's testator, by a deed absolute, under an agreement not in writing, whereby the wife agreed to pay a certain sum of money, without alleging to whom the money was to be paid; that his wife agreed that the plaintiff and herself and a third person should each have a one-third interest in the property and in the event of the death of either, the plaintiff or his wife, the share of the one so dying should go to the survivor, and that in reliance upon the strength of that agreement he conveyed the premises to his wife who has since died. *Held*, that the complaint fails to set forth an agreement which can be specifically enforced since the facts stated do not disclose with sufficient clearness what the agreement relied upon was, in that it does not appear to whom the money was to be paid, and it is not stated when the plaintiff was to obtain a conveyance of his one-third interest, nor is it alleged that the plaintiff's wife received the title in trust to convey or that she promised in any event to convey, either by deed or will, any interest in the property to the plaintiff.

Nor are the facts alleged sufficient to create a resulting trust since there is no allegation of mutual mistake, or of fraud or overreaching on the part of the wife, and the fact that the wife may have agreed to pay a certain sum of money is not sufficient to create a trust for plaintiff's protection in view of the fact that the deed was an absolute one and that during the life of the wife the plaintiff did not assert his claim that she held the property in trust.

Moreover, the allegations of the complaint show no necessity for the intervention of a court of equity to override the Statute of Frauds.

PAGE and GREENBAUM, JJ., dissent, with opinion.

APPEAL by the plaintiff, Robert Ankele, from an order of the Supreme Court, made at the Bronx Special Term and entered in the office of the clerk of the county of Bronx on the 24th day of November, 1920, denying plaintiff's motion to sustain the demurrer to the separate and complete defense alleged in paragraph V of the answer, and overruling said demurrer.

*Julius Riedler*, for the appellant.

*Charles G. Bond* of counsel [*Coulter & Bond*, attorneys], for the respondents.

MERRELL, J.:

The action is brought by one Robert Ankele against George Blankner, as executor of the last will and testament of Alice L.

Ankele, deceased, and others, to compel the conveyance to the plaintiff of a two-thirds interest in certain property at No. 1984 Valentine avenue, in the borough of The Bronx, city of New York. The plaintiff also seeks to compel the said executor to account for all income derived from the property since its transfer to deceased. The complaint alleges that the plaintiff, Robert Ankele, is the surviving husband of Alice L. Ankele, deceased; that the parties lived together down to the time of the death of plaintiff's wife, which occurred on the 27th day of October, 1918; that Alice L. Ankele left a last will and testament, in which she empowered her friend, the defendant Frank J. Brockie, "to take full charge of my property, No. 1984 Valentine Avenue, \* \* \* with full power and authority to manage same, to collect all rents, \* \* \* until the property is sold for a proper figure, not less than sixteen thousand dollars, and out of the net income he is to receive one-fourth of the net income, and my husband, Robert Ankele, is to assist Mr. Brockie in the up-keep of the place and is to have one-fourth of the net income, and my father and mother, David Curtis and Ann Curtis, are to have one-half of the net income, for moneys they have advanced me; and after the sale and all debts are paid in connection with that property, including fifteen hundred dollars due my husband, Robert Ankele, and including the five hundred dollars to be paid to Frank J. Brockie, I give, devise and bequeath the proceeds thereof, one-fourth to my said husband, Robert Ankele, two-fourths to my father and mother, David and Ann Curtis, or the survivor of them, and the remaining fourth to my friend Frank J. Brockie, and I give my executor full power and authority to make, execute and deliver proper deeds to cover the same to the purchaser and distribute the proceeds as above provided." The complaint then alleges that the Valentine avenue property was originally purchased by the plaintiff with money belonging exclusively to him; that on or about the 1st day of May, 1916, the plaintiff executed a deed thereof to his wife, Alice L. Ankele; that said property was so conveyed pursuant to an "agreement had with the decedent, the plaintiff and defendant Frank J. Brockie, wherein the said decedent, Alice L. Ankele, agreed to pay the sum of Fifteen Hundred (\$1,500) dollars within a reasonable time,

after the said conveyance to her, and also agreed to pay the sum of Five Hundred (\$500) dollars to the said defendant Frank J. Brockie. And further agreed that the said parties the plaintiff, Frank J. Brockie and said Alice L. Ankele, shall each have a one-third interest in said property, and that in the event of the death of either, the said plaintiff or Alice L. Ankele, deceased, the share of the one so dying shall go to the survivor, that is plaintiff or the decedent;" and "that the plaintiff relying upon the strength of the aforementioned agreement, and upon the promises made by Alice L. Ankele, the said decedent, transferred the property to the said Alice L. Ankele, deceased." The Valentine avenue property is alleged to be of the value of \$12,000, subject to a mortgage upon which is due the sum of \$6,500.

The answer of the defendant David Curtis denies the allegations of the complaint respecting the agreement therein alleged to have been made by Alice L. Ankele, deceased, at the time of the aforesaid conveyance to her, and alleges as a "separate and complete defense:"

"V. That the alleged agreement mentioned and described in paragraph 'Seventh' of the complaint herein was not, nor was any note or memorandum thereof expressing the consideration in writing, subscribed by Alice L. Ankele or by her lawfully authorized agent."

To this "separate and complete defense" the plaintiff has demurred, and such demurrer has been overruled by the court below. For the purposes of the demurrer, this defense must be treated as an entirely separate and distinct part of the answer. The defendant is not entitled to the benefit of any denials contained in any other part of the answer, as such denials are not repeated by reference or otherwise incorporated in this separate affirmative defense. (*Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; *Bulova v. Barnett, Inc.*, 193 App. Div. 161.) General denials are, of course, improper in such an affirmative defense, but, when necessary, special denials may be therein alleged. It, therefore, follows that all of the allegations contained in the complaint must be assumed to be true, as well as the facts stated in this defense.

The complaint does not allege that the agreement made with deceased was in writing. If upon reply or at the trial

the agreement proves to have been oral, the Statute of Frauds will be a good defense, unless facts appear which require the court to grant plaintiff equitable relief, in order to prevent the statute becoming an instrument of fraud. (See Real Prop. Law, §§ 242, 259.) The question to be determined, therefore, is: Does the complaint state facts requiring the intervention of a court of equity?

The plaintiff claims that the facts stated entitle him either to a specific performance of the alleged agreement and to an accounting, or to such other relief as will place him in the position which he claims he has the right to occupy by reason of his reliance upon the alleged agreement of his wife made prior to his conveyance of the property to her.

The complaint, carefully analyzed, does not fall within any of the cases cited by the appellant. The facts stated do not disclose with sufficient clarity what the agreement relied upon was. It does not appear to whom the sum of \$1,500 was to be paid; no time is stated when the plaintiff was to obtain or receive a conveyance of his alleged one-third interest in the property conveyed; nor does it appear that Alice L. Ankele received the title in trust to convey, or that she promised in any event to convey, either by deed or will, any interest in the property to the plaintiff. At the time of the conveyance plaintiff was the owner of the premises and could have reserved to himself such rights therein as he desired to retain. The deed, however, was absolute upon its face. The bare statement by plaintiff that he was to have a one-third interest in the property during his life and another one-third in case he survived his wife is not sufficient. The complaint fails to set forth an agreement which can be specifically enforced. Nor are the facts alleged sufficient to create a resulting trust. It is not alleged that the deed was improperly drawn and did not correctly state the intention of the grantor, and no reformation thereof is asked. So far as appears, the conveyance was absolute and voluntary. It was not given to accomplish any purpose which the plaintiff could not, at the time, have accomplished himself. So far as appears, the grantee could, at any time, give an absolute title to the property. The most that can be said from the facts alleged is, that the grantee may have promised, as consideration for

the conveyance, to pay \$1,500 to some unnamed person and \$500 to the defendant Frank J. Brockie. If such an agreement can be proved and has not been performed, an action at law will lie to recover damages for the breach. The plaintiff cannot now be heard to say that a part of the title was reserved by him at the time of his conveyance to his wife. Having thus conveyed his property without reservation, a mere statement that plaintiff was to have "a one-third interest in said property" is not sufficient to create a trust for plaintiff's protection.

Moreover, no fact is alleged which shows any intention on the part of the plaintiff to create a trust or that his wife was to act as trustee. Plaintiff even goes so far as to say, "that at no time since the transferring of the property to the deceased has the said deceased, Alice L. Ankele, accounted for the income derived from the said property." In other words, it appears upon the face of the complaint that during her lifetime the grantee had full possession of the premises and received the income and profits, which fact is perfectly consistent with absolute ownership, but wholly inconsistent with plaintiff's claim that it was agreed that he should have a one-third interest and one-third of the income. Had the complaint alleged that deceased, during her lifetime, made payments of rent to the plaintiff or that she recognized plaintiff's alleged rights in any manner inconsistent with her claim of ownership, such acts would have some probative force. Not only did the grantee receive an absolute deed, but she enjoyed and possessed the property during her lifetime without any interference or participation therein on the part of the plaintiff, so far as appears in the complaint. Nor is the wife charged with any fraud or misrepresentation in order to obtain the title. No good reason is, therefore, shown why the plaintiff should now ask a court of equity to relieve him from the situation in which he is and which has resulted from his voluntary and absolute deed to his wife. Certainly the vague and indefinite agreement claimed to have been relied upon by him is insufficient to raise a trust in his favor and to require the intervention of a court of equity for that purpose. (*McCartney v. Titsworth*, 119 App. Div. 547;



*Gould v. Gould*, 51 Hun, 9; *Woolley v. Stewart*, 222 N. Y. 347.)

The facts in the case at bar differ materially from those in *Gallagher v. Gallagher* (135 App. Div. 457; *affd.*, 202 N. Y. 572) and other cases cited by appellant. In the *Gallagher* case the deed had been given by a man to his wife for the sole purpose of enabling her to become the surety on the husband's bond. It is apparent that in such case it was necessary for a court of equity to intervene in order to prevent a fraud. Similar situations arose in *Amherst College v. Ritch* (151 N. Y. 282) and *Ahrens v. Jones* (169 *id.* 555). A court of equity will not override the Statute of Frauds unless it clearly appears that such statute would in the given case, except for the intervention of a court of equity, be an instrument of fraud. The facts alleged in the complaint in the case at bar show no such necessity.

The order appealed from should, therefore, be modified by providing that the complaint be dismissed unless the plaintiff serves an amended complaint within twenty days from service of the order to be entered hereon, leave for which is granted on payment of ten dollars costs, and as so modified affirmed, without costs of this appeal.

DOWLING and LAUGHLIN, JJ., concur; PAGE and GREENBAUM, JJ., dissent.

PAGE, J. (dissenting):

I cannot concur in the prevailing opinion that the agreement alleged in the complaint is too indefinite to be enforced in equity by specific performance. It is conceded that if the facts alleged can be proved, an action at law will lie to recover damages for the breach of the agreement to pay the \$1,500 and the \$500. But that is only a part of the agreement alleged. The remaining portion as alleged in the complaint is, "that the said parties the plaintiff, Frank J. Brockie and said Alice L. Ankele, shall each have a one-third interest in said property, and that in the event of the death of either, the said plaintiff or Alice L. Ankele, deceased, the share of the one so dying shall go to the survivor, that is plaintiff or the decedent." It is thought by the majority of my brethren that it is

improbable that the plaintiff would give an absolute deed to his wife in reliance upon this oral agreement, when he might have reserved to himself such rights in the property as he desired to retain. We are not weighing evidence or considering the possibility of plaintiff's ability to prove the facts alleged. We are considering a demurrer to a defense of the Statute of Frauds, which has been overruled at Special Term, properly, if the defense alone is involved; but on the theory that a demurrer searches the record and reaches the first error in pleading, the sufficiency of the complaint is challenged. We must, then, consider that all the facts stated are true, and indulge every inference that can reasonably be drawn in favor of the plaintiff. It is not a question of whether he can prove the facts or of the improbability of his having done a thing that he has asserted he did do. We must accept the facts alleged as proved.

If the portion of the agreement relating to payment by Alice L. Ankele is sufficiently definite to support an action at law for the breach (and I agree with Mr. Justice MERRELL that it is), the whole agreement is proper matter for enforcement in equity, as it relates to an interest in real property. That a contract calls for the creation of an interest in land has long been regarded as a demonstration that the remedy at law, which cannot compel specific performance, is inadequate. If any uncertainty exists by reason of the fact that the complaint does not name the person to whom the grantee was to pay the \$1,500, it is removed by the recital in the will of Alice L. Ankele, a copy of which is annexed to the complaint and made a part thereof, of a debt of \$1,500 due her husband, Robert Ankele (the plaintiff), in connection with the property in question, coupled with a mention of the \$500 due the defendant Brockie. The liberal construction of the pleadings required by section 519 of the Code of Civil Procedure must be that the \$1,500 was to be paid to the plaintiff.

An agreement that A will transfer land to B, and B will pay \$1,500 to A and \$500 to C, and A, B and C each will have a one-third interest in the land, the survivor of A and B to succeed to the share of the other, is not so indefinite or uncertain so as to be incapable of enforcement. The answer to the question defined by Mr. Justice MERRELL depends

not on the indefiniteness of the agreement, but on whether there has been sufficient part performance to take the case out of the Statute of Frauds. (See Real Prop. Law, §§ 242, 259.) The inquiry is not whether the agreement can be proved, but whether sufficient appears to require its enforcement in spite of the fact that it was not in writing.

Here we have an agreement, in reliance upon which the plaintiff conveyed the land to his wife, thus fully performing his part. By the agreement he was to get \$1,500 and a two-thirds interest in case he survived his wife. Her will has attempted to disregard the agreement and give him only \$1,500 and a one-fourth share of the net income and of the proceeds of the property when it is sold.

Reference to the record on appeal in the case of *Gallagher v. Gallagher* (135 App. Div. 457; *affd.*, 202 N. Y. 572), of which the prevailing opinion says: "It is apparent that in such case it was necessary for a court of equity to intervene in order to prevent a fraud," reveals that the complaint contained only one allegation, the counterpart of which is not found in the complaint under discussion, namely, that subsequent to the deed the husband had paid all taxes and water rents, had collected the rents and appropriated them to his own use, and the wife had made no protest. Here, however, we have the allegation that the wife had repeatedly promised to live up to the terms of the agreement and the plaintiff relied on her promises. The fraud is just as apparent as in the *Gallagher* case.

The case of *Gould v. Gould* (51 Hun, 9), a decision of the General Term in the Fifth Department, cited in the prevailing opinion, has been expressly disapproved of by the same General Term in the later case of *Gage v. Gage* (83 Hun, 362, 364).

*McCartney v. Titsworth* (119 App. Div. 547) was a three to two decision of the Appellate Division of the Fourth Department, which was never passed upon by the Court of Appeals. The action was against a life tenant to restrain waste. He defended on the ground of an oral agreement of his wife, from whom he held the life tenancy, to convey the land to him on request. The majority of the court considered only certain evidence and held it insufficient to show the defendant entitled to specific performance of any agreement that the farm should

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be deeded to him in consideration of his making certain improvements on it. The question was decided with relation to an agreement made after the property was conveyed to the wife. The minority of the court based their dissent on the proposition that the land was conveyed to the wife in performance of the agreement, and all the improvements were made in addition. The decision of the majority was based on a state of facts essentially different from the present case. The later case of *Gallagher v. Gallagher* (*supra*), which was affirmed by the Court of Appeals, should govern here, rather than *McCartney v. Titsworth*.

In *Woolley v. Stewart* (222 N. Y. 347) the Statute of Limitations furnished ample reason for the decision; in fact, Judge CARDOZO concurred on this ground. The other remarks were not necessary to the conclusion reached.

GREENBAUM, J., concurs.

Order modified by dismissing complaint unless plaintiff serve an amended complaint, leave for which is granted on payment of ten dollars costs, and as so modified affirmed, without costs.

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ORINOCO REALTY COMPANY, INC., Respondent, v. MAURICE  
BANDLER, Appellant.

First Department, July 8, 1921.

**Landlord and tenant — action to recover rent of property in New York city — defense that lease was executed under duress not established — lease executed prior to taking effect of rent laws of 1920 not affected thereby.**

In an action to recover rent of property in the city of New York the answer does not state facts sufficient to constitute the common-law defense of duress in the execution of the lease, where it is alleged merely that the plaintiff refused to renew the lease for a new term at a reasonable and fair market value, but demanded that defendant execute a lease for a term of three years at the unreasonable, excessive and oppressive rental of more than double the rent being paid; that said demand was made in anticipation of the so-called rent laws of 1920, which were then pending

in the Legislature; that the defendant was unable to secure other housing facilities and protested against the force, coercion and intimidation of the plaintiff, and that he executed the lease under threat of plaintiff to immediately rent the premises to another.

The so-called rent laws of 1920 are not retrospective in operation and, therefore, do not apply to a lease executed prior to the time of their taking effect.

APPEAL by the defendant, Maurice Bandler, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 25th day of February, 1921, granting plaintiff's motion for judgment on the pleadings consisting of a complaint and answer.

*I. T. Flatto* [*Alanson T. Briggs* with him on the brief], for the appellant.

*Lewis M. Isaacs* of counsel [*M. S. & I. S. Isaacs*, attorneys], for the respondent.

*Henry F. Wolff* of counsel [*Isidor Lazarus* with him on the brief; *Ivins, Wolff & Hoguet*, attorneys], *amicus curiæ*, in behalf of the mayor's committee on rent profiteering.

GREENBAUM, J.:

The complaint alleges that on March 26, 1920, the defendant entered into an agreement of lease with the plaintiff in the terms of renewal of a lease under which defendant was then in possession of an apartment at 1155 Park avenue, New York city, for a three-year term commencing October 1, 1920, at an annual rental of \$5,750 and that the rent for the first three months of this term and electric charges had not been paid by the defendant, amounting to \$1,461.45, for which sum judgment is asked.

The answer, after alleging certain denials which are unimportant here, sets up as a separate and distinct defense that the alleged lease was signed by the defendant under pressure and duress; that at the time of making the lease he occupied the premises under a lease expiring September 30, 1920, at an annual rental of \$2,400; that on March 26, 1920, plaintiff refused to renew the lease for a new term at a reasonable

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and fair market value, but demanded that defendant immediately execute a lease for a three-year term from October 1, 1920, at the unreasonable, excessive and oppressive rental of \$5,750 per annum, over double the amount of the previous rental, an increase of nearly 140 per cent; that said demand was made in anticipation of the so-called April Rent Laws which were then pending in the Legislature, and became a law a few days after the alleged lease was executed; that defendant was in grave fear because of said threat, and made every effort to obtain other housing facilities for himself and his wife and children, but found that it was impossible to find suitable quarters elsewhere; that defendant protested against the force, coercion and intimidation of plaintiff; that he executed the alleged lease under threat of plaintiff to immediately rent the premises to another and that after said April Rent Laws became effective, plaintiff promised defendant that it would thereafter not charge more than a reasonable rental for said premises, the said lease notwithstanding; that defendant did not enter into possession of said premises on October 1, 1920, by reason of said lease, but continued in occupation of the premises after the expiration of the term of his prior lease, relying upon the relief intended to be afforded him by the Legislature in the enactment of the Rent Laws which became effective on September 27, 1920, before the expiration of his prior lease; that defendant offered to pay the plaintiff the rent due on October first, at the rate of the previous rental of \$2,400 per annum, but plaintiff refused to accept said payment; and that defendant is ready, willing and able to pay a fair and reasonable market rental for the occupancy of the premises.

It appears from the papers on appeal that the learned justice at Special Term who granted plaintiff's motion for judgment on the pleadings accompanied it with the following memorandum: "It being conceded by the parties that the Rent Laws of 1920 are not relied on to determine the issues herein, the motion for judgment on the pleadings is granted, with costs."

Counsel for the appellant here contends that it was not his intention at Special Term to lead the court to think that he had made the concession mentioned in the foregoing memo-

random and that the learned justice evidently labored under a misconception in that respect.

Counsel for the respondent, however, calls our attention to the fact that the memorandum submitted by the appellant's counsel at Special Term opened with the statement that "the defense is common law duress," and concluded as follows: "A strictly common law defense of duress is set up in the amended answer."

The argument of appellant's counsel before us was limited to the consideration of the alleged rights of the defendant under the so-called Rent Laws. It is thus evident that the defendant does not now seek to uphold his answer upon the theory that it sets up a common-law defense of duress. There is no doubt that the common-law defense of duress will not avail the defendant, as sufficiently appears from the dissenting opinion of Judge McLAUGHLIN in *Levy Leasing Co., Inc., v. Siegel* (230 N. Y. 634) in which he discussed the common-law defense of duress, which had been interposed, and held that it was insufficient, a conclusion with which "all the members of the court agree." Considering the pleadings under the Rent Laws of 1920, it seems to us only necessary to refer to the following cases which have passed upon the question before us: *Paterno Investing Corp. v. Katz* (112 Misc. Rep. 242; *affd.*, 193 App. Div. 897); *Sylvan Mortgage Co., Inc., v. Stadler* (115 Misc. Rep. 311); *Seventy-eighth Street & Broadway Co. v. Rosenbaum* (111 *id.* 577).

In affirming *Paterno Investing Corp. v. Katz* (*supra*), which held that chapter 136 of the Laws of 1920 does not apply in the case of a lease of premises made before April 1, 1920, when the law became operative, we necessarily approved of the conclusions of the learned Special Term justice that the Rent Laws had no retrospective application. We find no reason for changing our views in that respect. The constitutionality of the Rent Laws was, of course, based upon the legislative finding of an existing emergency, and it may be fairly assumed that the conditions which called upon the Legislature to declare the existence of the emergency prevailed for some time before such legislative declaration. But we nevertheless cannot give retrospective effect to such legislation unless the Legislature in unmistakable terms stated that

prior leases made under conditions similar to those existing when the emergency legislation was passed shall come within its provisions. If appellant's contention be sound it would be necessary in each case where a lease was made prior to April 1, 1920, to determine the conditions prevailing when the lease was executed. Hopeless confusion would result from such a construction of the legislative enactments.

The order of the Special Term must be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ.,  
concur.

Order affirmed, with ten dollars costs and disbursements.

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PARTOLA MANUFACTURING COMPANY, Appellant, v. GENERAL  
CHEMICAL COMPANY, Respondent.

First Department, July 1, 1921.

**Sales — action for refusal to deliver — contention of seller that buyer did not demand delivery within time specified not sustained in view of modification of contract — direction for delivery in "car load lots f. o. b. New York" ambiguous in view of location of both parties in Greater New York — liability of buyer to pay cost of transportation — waiver by seller of objection that shipping instructions were not sufficiently specific — delay in sending shipping instructions not sufficient to authorize seller to renounce obligations under contract — failure of seller to rescind contract.**

In an action by a buyer to recover damages for breach of contract by the seller in refusing to deliver goods, *held*, that the defendant's refusal to deliver upon the sole ground that no demand was made by the plaintiff for shipment until after the expiration of the time mentioned in the contract cannot be sustained, since the contract was so modified as to extend the time for delivery.

The provision of the contract that delivery was to be in barrels "car load lots f. o. b. New York" is ambiguous, in view of the fact that the defendant's works were at Long Island City, and that the goods were sold for consumption by the plaintiff whose factory was in Manhattan, a fair interpretation of the contract calls for the transportation of the goods to Manhattan, with the liability of the buyer to pay the cost of transportation.



In view of the ambiguous provision as to delivery, the direction by the buyer for delivery either to its factory or to some dock in New York was not sufficiently specific, but the seller by failing to object upon that ground waived any insufficiency in the shipping instructions.

In view of section 126 of the Personal Property Law and the provisions of the contract, assuming that there was unreasonable delay in sending shipping instructions and making demand for the installments which might be due during the month mentioned in the original contract, there is nothing to show that such failure on the part of the buyer was sufficiently material to authorize the seller entirely to renounce its obligations under the contract.

Moreover, assuming that there was such unreasonable delay in demanding shipment as authorized the seller to rescind the contract under section 146 of the Personal Property Law, it did not elect to rescind nor place its refusal to deliver upon any such ground.

APPEAL by the plaintiff, Partola Manufacturing Company, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 15th day of April, 1920, upon the decision of the court rendered after a trial at the New York Trial Term, a jury having been waived.

*Albert A. Hovell* of counsel [*Raymond C. Haff* with him on the brief; *Hovell, McChesney & Clarkson*, attorneys], for the appellant.

*Schuyler M. Meyer* of counsel [*Steele & Otis*, attorneys], for the respondent.

SMITH, J.:

This action is brought by the plaintiff to recover damages for a breach of contract in the refusal to deliver blue vitriol. The sale was made through a broker and a broker's memorandum was delivered to the plaintiff which reads as follows:

" NEW YORK, August 10th/17.

" Sold for account of General Chemical Co.

" Selling Agents for Nichols Copper Co.

" To Partola Mfg. Co., 160 Second Ave., New York City.  
abt. (150) One hundred and fifty tons Nichols Triangle brand 98/99% large crystals, Blue Vitriol, standard quality, (9) nine cents per lb. Payable (30) thirty days net, or cash (10) days less (1%) one percent. buyers option, from delivery.

Shipments from works during last half of October, 1917. Sellers not to be held for contingencies beyond their control. tons of 2000 lbs. net.

"H.W. HENNING & SON

"FREDERICK ENDIES

"H. W. HENNING & SON,

*Brokers*

"Eighty Maiden Lane."

This contract was subsequently modified so as to provide that no carload should be ordered until payment by the plaintiff of a prior carload delivery. The original contract provided for the deliveries in October. Inasmuch, however, as by the modified contract the plaintiff was given ten days in which to pay for a carload, the effect of the modification before mentioned would operate to extend the time of delivery from sixty to eighty days after October ninth, and this construction has been given to the contract as modified by the Trial Term. From the evidence a carload consisted of about eighteen tons, so that to perform the contract, from six to eight carloads would be required. No deliveries were asked for in October. On November tenth, however, the plaintiff demanded delivery. To this the defendant responded by telephone to the effect that the contract provided for deliveries in October, and as October had passed, the defendant insisted that it was not bound to make delivery upon the demand of November tenth.

After delivery by the broker of the broker's memorandum, the contracts were written out in full and a copy was sent to the plaintiff which signed the same. The defendant, however, neglected to sign its copy, but did not return the same or make objection thereto. No question under the Statute of Frauds is presented by the pleadings. In the contract as written out it was provided that the goods were sold for consumption and not for resale. The plaintiff's factory was situated at 207 East Tenth street, and the delivery demanded upon November tenth was for delivery at that place or, if that were not practical, to any downtown New York pier. The brokers were the selling agents for the defendant which had its factory in Long Island City, which is within the greater city of New York.

The first question to be considered is the effect of the

provision in the contract that the delivery was to be in barrels "car load lots f. o. b. New York." Inasmuch as the defendant's works were at Long Island City, within the city of Greater New York, and as the goods were sold for consumption by the plaintiff, whose factory was in Manhattan, this provision of the contract that the delivery was to be in car-load lots f. o. b. New York is ambiguous. Some of the experts as to custom have testified upon the effect of this provision in such a contract, and some of them say that it has no significance. An f. o. b. contract, however, is recognized as placing the cost of transportation upon the buyer, and, while Long Island City is in the city of Greater New York, a fair interpretation of this contract to my mind is to call for a transportation of the goods to Manhattan with the liability of the buyer to pay the cost of transportation.

The question then arises as to the requirement of the buyer to give shipping instructions as to the carrier and method of transportation, whether the goods shall be transported by truck or by water. In view of this ambiguity, I am of opinion that the direction for delivery either to the plaintiff's factory or to some dock in New York was not sufficiently specific. But the defendant made no objection upon that ground, but placed the refusal to deliver purely upon the limit of its liability to deliver during the month of October. If more specific instructions had been asked they would undoubtedly have been given, and the defendant cannot now claim a refusal to deliver by reason of the indefiniteness of the shipping instructions which was not mentioned as one of the grounds for refusal to make delivery. I am mindful of the fact that the telephonic communication sworn to by the plaintiff of the refusal and the ground therefor is contradicted by the defendant. The probabilities, however, are all with the plaintiff upon this point in issue. Undoubtedly some answer was made to the demand for shipment. The contention that the goods should have been called for under the contract during October is made by the defendant both in its pleadings and in its brief. It is more probable, therefore, that the plaintiff's testimony is correct as to the specification of the ground for refusal in this telephonic communication. The plaintiff swears that just prior to November tenth similar

instructions were given over the telephone which the defendant asked to have put in writing, and the letter of November tenth was written in pursuance of this request on the part of the defendant. Any objection, therefore, that the shipping instructions were not sufficiently specific must be deemed to have been waived by the defendant.

By section 126 of the Personal Property Law (as added by Laws of 1911, chap. 571) it is provided that if the buyer neglects to take delivery of one or more installments under a contract providing for delivery by installments, "it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken." Assuming that there was unreasonable delay in sending shipping instructions and making demand for the installments which might be due in October, there is nothing in the case to show that such a failure on the part of the plaintiff was sufficiently material to authorize the defendant entirely to renounce its obligations under the contract. In the written contract it is provided: "Each month's shipment to be treated as a separate and independent contract, but if buyer fails to fulfill terms of order, purchase, or payment under this, or other contracts, seller may defer further shipments until such default is made good and may at its option treat such default as final refusal to accept further shipments hereunder."

Under section 146 of the Personal Property Law (as added by Laws of 1911, chap. 571) a seller is authorized to rescind a contract "by giving notice of his election so to do to the buyer." If we assume for the argument that there was such an unreasonable delay in demanding shipment as authorized the seller to rescind the contract, apparently the seller did not elect to rescind nor place its refusal to deliver upon any such ground, but it placed its refusal to perform only upon the ground that no demand for shipment could be made after October, which ground under the contract as modified must be held not to have been well taken.

The conduct of the defendant is not such as to call for any

liberal interpretation of the defendant's rights in this action. After the contract was made the defendant made additional exactions and was then offered an opportunity to rescind the contract by the plaintiff, of which it did not avail itself. The plaintiff complied, however, with all of these new exactions and of the modification as demanded, and it was only when the price had risen somewhat and the execution of the contract would have been unprofitable to the defendant that it refused to perform, placing its refusal upon an entirely inadequate ground.

In my judgment the determination of the trial court that the plaintiff has not established its cause of action was erroneous and should be reversed. The trial court also dismissed the defendant's right of action upon its counterclaim and properly so. But the question is not before us because the defendant has not appealed.

The judgment should, therefore, be reversed and a new trial granted, with costs to appellant to abide the event.

DOWLING, LAUGHLIN and MERRELL, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event. Settle order on notice.

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In the Matter of the Application to Punish JOHN ANDERSON LEACH, Respondent, for a Contempt in Refusing to Be Sworn as a Witness in the Matter of the New York State Legislative Committee to Investigate the Affairs of the City of New York.

JOINT LEGISLATIVE COMMITTEE, Appellant.

First Department, July 1, 1921.

Legislature — joint legislative committee to investigate affairs of city of New York not standing committee of Legislature within meaning of Legislative Law, § 61 — committee has no power to appoint subcommittee of one — contempt — refusal of witness to be sworn before subcommittee of one not contempt — committee has no power to take testimony in private.

A joint legislative committee appointed pursuant to a joint resolution of the Legislature during the session of 1921 to investigate the affairs of the city of New York is not a standing committee of the Legislature

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First Department, July, 1921.

within the meaning of section 61 of the Legislative Law, and that section has no applicability to said joint legislative committee though it may be used as indicative of the legislative policy touching the conduct of an investigating committee.

The joint legislative committee has no power under the resolution creating it to appoint a subcommittee of one member to conduct an examination and swear witnesses.

Accordingly, a person subpoenaed to appear before a subcommittee of one of said joint legislative committee is not in contempt for refusal to be sworn as a witness.

Said joint legislative committee has no authority to take testimony in private or with closed doors.

CLARKE, P. J., and PAGE, J., dissent as to last paragraph of head note.

APPEAL from an order of the Supreme Court, made at the New York Special Term, denying a motion to punish for contempt.

*Samuel A. Berger and Leonard M. Wallstein [Elon R. Brown of counsel]*, for Joint Legislative Committee.

*John P. O'Brien, Corporation Counsel [William E. C. Mayer and William J. Ahearn with him on the brief]*, for the respondent.

CLARKE, P. J.:

The respondent, a deputy commissioner of police, was served with a *subpoena duces tecum* requiring him to produce certain books, papers, documents, etc., before the joint legislative committee appointed by the Legislature under a joint resolution passed on the 13th and 15th days of April, 1921. He appeared and produced the books and papers before the chairman of the said joint committee purporting to sit as a subcommittee of one but declined to be sworn and examined in private before a committee of one. He was subsequently declared in contempt at a session of the joint committee, and persisting in his refusal to be examined before a subcommittee of one, this proceeding was instituted before the Special Term to punish him as for contempt. The learned Special Term denied the application stating among the grounds for its action that section 61 of the Legislative Law provided as follows:

"Subcommittees. Whenever any standing committee of either house of the Legislature shall be required to make an

inquiry or investigation, such committee may appoint a subcommittee of not less than three of its own members to make such inquiry or investigation, and to take testimony in relation thereto; and such committee or subcommittee and the chairman thereof shall respectively have all the powers and authority, which are conferred by law upon any committee which is authorized to send for persons or papers, or upon the chairman thereof."

As the joint legislative committee now investigating the affairs of the city of New York is not a standing committee of either house of the Legislature we are of opinion that the section quoted is not directly applicable. It may be used, however, as indicative of the legislative policy touching the conduct of an investigating committee. An examination of the resolution under which the committee was appointed convinces us, however, that a subcommittee of one member to conduct an examination and swear witnesses was not within the purview of said resolution and not authorized thereby and that the resolution of the committee which designated the chairman as a subcommittee of this committee and authorized the chairman to appoint as many additional subcommittees, consisting of one or three members each as may be determined by the chairman, was not authorized by the joint resolution appointing the committee which is as follows:

"The committee may at any time and from time to time by resolution of a majority of its members, be subdivided into sub-committees of such number as it may by majority determine, which sub-committees may sit at the same time and place or at different times and places in the State of New York during the session of the Legislature, during its recess or after the adjournment, each such sub-committee to appoint its own chairman and to act by majority vote of its own members and to administer oaths and to issue subpoenas requiring the attendance of witnesses and the production of books, papers and documents and to do all other acts and things that may be done by the committee as a whole or that may be delegated to it by the full committee." (See N. Y. Legislative Index 1921, p. 414.)

This language clearly negatives authority to appoint a subcommittee of one which shall exercise all the powers conferred upon the committee as a whole. We do not think it

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necessary to discuss any of the other questions presented, with the exception of the question as to whether the committee has the right to take testimony in camera. The majority of the court are of the opinion it has no such power. Mr. Justice PAGE and the writer of this memorandum dissent from that conclusion. We recognize the power of the Legislature to conduct investigations for the purpose of framing legislation. No obstacles by the local authorities should be unnecessarily thrown in the way of this committee appointed to investigate the affairs of the city of New York. If there is anything wrong which may be righted by appropriate legislation it ought to be discovered. If there is nothing wrong it will be in the interests of the community to establish that. Upon the particular point presented we are of the opinion that the order appealed from was right in denying the motion to punish for contempt because the joint resolution did not authorize the appointment of a subcommittee of one.

The order appealed from should be affirmed.

LAUGHLIN, PAGE, MERRELL and GREENBAUM, JJ., concur.

Order affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWARD F. BOYLE, Appellant, v. MICHAEL J. CRUISE, as City Clerk of the City of New York, and JOHN R. VOORHIS and Others, as Custodians of Primary Records and Constituting the Board of Elections of the City of New York, Respondents.

First Department, July 1, 1921.

**Constitutional law — Aldermanic Reapportionment Act (Laws of 1921, chap. 670, amdg. Greater New York charter, § 19) is constitutional — apportionment of aldermanic districts need not be based upon equality of population — fifteen days within which city may act on special city law under Constitution, art. 12, § 2, begins to run on date of mailing of bill — said constitutional provision construed with General City Law, § 34.**

The Aldermanic Reapportionment Act (Laws of 1921, chap. 670, amdg. Greater New York charter, § 19) is not unconstitutional upon the ground that the apportionment formation of the aldermanic districts is not measured



by the number of residents or inhabitants or is disproportionate thereto, for there is no requirement in the Constitution that the reapportionment of aldermanic districts shall be based upon the equality of population; nor is said act unconstitutional upon the ground that the Legislature repassed it before the expiration of the fifteen days allowed to the mayor of the city of New York to consider and return the same under section 2 of article 12 of the Constitution, where said act was mailed to the mayor on the thirty-first day of March, received by him on April first, and again passed by the Legislature on April sixteenth, on the theory that it had not been returned within fifteen days, for the fifteen days within which the mayor shall return the bill to the house from which it was sent as required by section 2 of article 12 of the Constitution begins to run upon the date of the mailing of the bill in Albany and not upon the date when it is received in New York city.

The provision of section 34 of the General City Law that the clerk of the house in which the particular bill originates shall place thereon the date of the "transmission" to the mayor of the city is controlling in the interpretation of the aforesaid constitutional provision, for, if by the word "transmission" is meant the receipt of the bill by the city authorities, the provision of the General City Law would be incapable of enforcement.

APPEAL by the relator, Edward F. Boyle, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of June, 1921, denying relator's motion for a writ of mandamus to compel the authorities of the city of New York to disregard the Aldermanic Reapportionment Act, chapter 670 of the Laws of 1921 (amdg. Greater New York charter [Laws of 1901, chap. 466], § 19, as amd. by Laws of 1916, chap. 540), in connection with notices required by the Election Law (§ 293, as amd. by Laws of 1913, chap. 820) to be given for the forthcoming election of a board of aldermen, on the ground that such act of 1921 is unconstitutional.

*John Godfrey Saxe* of counsel [*Robert L. Luce, William A. McQuaid, John Ingle, Jr.*, with him on the brief; *George W. Olvany*, attorney], for the appellant.

*Robert P. Beyer*, Deputy Attorney-General, of counsel [*Charles D. Newton*, Attorney-General], for the respondents.

*Leonard J. Obermeier* of counsel, for the Republican County Committee, New York County, intervenor, respondent.

SMITH, J.:

This proceeding challenges the constitutionality of the act in question upon two grounds: *First*, upon the ground that the apportionment formation of the aldermanic districts is not measured by the number of residents or inhabitants, but is disproportionate therein; and, *second*, upon the ground that the Legislature repassed the act before the expiration of the fifteen days allowed to the mayor of the city of New York to consider and return the same under article 12, section 2, of the State Constitution.

As to the first ground I think the challenge cannot be sustained. The aldermanic districts are apportioned substantially as are the assembly districts in the city. That apportionment has been acquiesced in and has not been judicially questioned. Nor, do I think that it can be successfully questioned. There is no requirement in the Constitution that the apportionment of aldermanic districts should be based upon the equality of population. In *Matter of Dowling* (219 N. Y. 44, 54) the Court of Appeals quoted from the Revised Record of the Constitutional Convention of 1894 (Vol. 4 [1900], pp. 1255, 1256): "We believe the provision to be sound in principle, that somewhere in every representative government there should be a recognition of variety of interest and extent of territory as well as of mere numbers united in interest and location. Such a departure from the rule of strict numerical representation is recognized by the Constitution of the United States in the organization of the Senate, by the Constitution of the State of Pennsylvania in limiting the representation which the city of Philadelphia may have in its Senate to one-sixth of its members, and by the Constitution of the State of Maryland in limiting the representation which the city of Baltimore may have. Similar provisions have been adopted by the State of Ohio affecting Cincinnati and Cleveland, the State of Missouri affecting St. Louis, the State of Rhode Island affecting Providence, and by other States of the Union having large cities. It is the rule, rather than the exception, throughout the Union."

It is not claimed that the difference in population was occasioned by any attempt to gerrymander the districts as that word is commonly used. Staten Island has become a

part of the greater city of New York with large territory and many substantial interests, which it is peculiarly within the province of the board of aldermen to supervise. To require an aldermanic district upon Staten Island to represent the same numerical population would be to disregard many material interests in that locality which are the subject of supervision and regulation by the board. Notwithstanding the general rule, where such interests are not involved, where the equality of population is a fair basis of apportionment in a city situated as is New York city with a congested population in certain localities and a more limited population in outlying districts, the interests of the community may well require those outlying districts to be represented to a greater extent than would be the case if their right to representation were measured simply by the number of their inhabitants. Without any requirement in the Constitution to make the extent of the population the basis of the apportionment other interests are entitled to be regarded in determining the division of aldermanic districts and I am unable to find any such discrimination as violates any principle which lies at the foundation of a fair apportionment and division of such districts.

The principal ground of challenge, however, arises under the provisions of section 2 of article 12 of the Constitution. It is therein provided that special city laws shall not be passed except in conformity with the provisions of this section, and the provision further reads: "After any bill for a special city law, relating to a city, has been passed by both branches of the Legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of such city, and within fifteen days thereafter the mayor shall return such bill to the house from which it was sent, or if the session of the Legislature at which such bill was passed has terminated, to the Governor, with the mayor's certificate thereon, stating whether the city has or has not accepted the same. In every city of the first class, the mayor, and in every other city, the mayor and the legislative body thereof concurrently, shall act for such city as to such bill; but the Legislature may provide for the concurrence of the legislative body in cities of the first class. The Legislature shall provide

for a public notice and opportunity for a public hearing concerning any such bill in every city to which it relates, before action thereon. Such a bill, if it relates to more than one city, shall be transmitted to the mayor of each city to which it relates, and shall not be deemed accepted unless accepted as herein provided, by every such city. Whenever any such bill is accepted as herein provided, it shall be subject as are other bills, to the action of the Governor. Whenever, during the session at which it was passed, any such bill is returned without the acceptance of the city or cities to which it relates, or within such fifteen days is not returned, it may nevertheless again be passed by both branches of the Legislature, and it shall then be subject as are other bills, to the action of the Governor. In every special city law which has been accepted by the city or cities to which it relates, the title shall be followed by the words 'accepted by the city,' or 'cities,' as the case may be; in every such law which is passed without such acceptance, by the words 'passed without the acceptance of the city,' or 'cities,' as the case may be."

The bill in question was passed upon the thirty-first day of March, and immediately mailed by the clerk of the Assembly, in which the bill originated, to the mayor of the city of New York, who received the same on April 1, 1921, about eleven o'clock. On April 16, 1921, the bill was again passed by both branches of the Legislature on the theory that the certified copy had not been returned within such fifteen days. The sole question on which the Legislature acted was "Shall this bill become a law, notwithstanding the failure of the mayor to return to the house the bill within the time fixed by the Constitution," the Speaker ruling that the bill should have been returned to the house before midnight of April fifteenth. After this bill was passed by both branches of the Legislature the Governor signed the bill, and upon the bill it was stated that the same was passed without the acceptance of the city. The question for determination here is whether the fifteen days in which the city may act and return the bill begins to run upon the date that the bill was mailed in Albany, or upon the date upon which it was received in New York city. The validity of the bill, therefore, depends upon the construction by the Legislature and by the Executive of the State that the

fifteen days began to run at the time that the bill was mailed by the clerk of the Assembly to the mayor of the city of New York. If it did not begin to run until it was received by the mayor of the city of New York upon April first the fifteen days did not expire until midnight of April sixteenth. Just before midnight of April sixteenth the bill was returned to the Executive without the acceptance of the city. The learned counsel for the appellant argues that the principle of home rule has been thus violated and seems to see a great peril to that principle in the construction thus placed upon the Constitution by the Legislature and by the Executive. I do not at all share in the apprehension of the appellant's counsel. The principle of home rule is in no way involved. One or two days at most would be required from the time of the mailing of the bill by the clerk of the Assembly to the mayor of any city in New York State. Whether the city authorities have under the Constitution thirteen, fourteen or fifteen days to consider the bill and return the same to the Legislature is to my mind a matter of little moment. The Constitution might have limited the time to ten days, and the principle of home rule would still have been maintained. There is no question that the city authorities have ample time in which to pass upon the bill, whether the Constitution be construed to allow thirteen, fourteen or fifteen days for its consideration. • The question for determination is purely a question of constitutional construction unembarrassed by considerations of the principle of home rule or any other purpose which was intended to be accomplished by the provision.

Constitutions, as well as statutes, must be construed from a common-sense standpoint in a way which will make their operation practicable. If the bill related to several cities, the date of the receipt of the bill by the authorities of those cities might vary one or two days. The Legislature is not presumed to know the exact space of time which will pass upon the mailing of the bill before its receipt by the city authorities, and still the limit of fifteen days before it is returned is a point of time of which the Legislature must have exact knowledge, in order to conform to the Constitution in repassing a bill, in case the same is not returned with the acceptance of the city within the time prescribed. There is no provision

in the Constitution that the Legislature should be notified when the bill is received by the city authorities and no way of ascertainment except by affidavits which might be forwarded and for which no provision is made in the Constitution. Such affidavits might conflict. The knowledge of the Legislature as to whether the city authorities have had possession of the bill for the time prescribed in the Constitution cannot rest upon any uncertainty or upon any proof by notification or affidavit. Any construction of the constitutional provision, therefore, which creates this uncertainty will be avoided if possible to the end that the Legislature may perform its constitutional duties upon facts warranting such performance. We are given little assistance by the lexicographers as to the meaning of the word "transmit." Undoubtedly in some cases that word should be construed to include delivery, and yet the transmission of a letter or of a notice, where such letter or notice may be sent through the mails, can only mean a delivery of the letter or the notice to the postal authorities. The framers of the Constitution are presumed to have had in mind the day or two that might be necessary for the receipt of the paper to be transmitted and to have provided a time sufficient and to have taken that into consideration and still to allow the city authorities such time as it deemed reasonable to consider and pass upon the bill which it must accept, or not, as it might determine. To my mind a controlling interpretation of this constitutional provision is contained in the law which was passed to carry out this provision of the Constitution. The General City Law, passed in 1895 as chapters 1 and 9 of the Laws of 1895 and re-enacted in 1900 as chapter 22 of the General Laws (Laws of 1900, chap. 327), and in 1909 as chapter 21 of the Consolidated Laws (Laws of 1909, chap. 26), provides for the transmission of these bills to the mayor of the city, and provides by section 34, which was re-enacted from sections 4 of the acts of 1895, that the clerk of the house in which the particular bill originated shall put upon the bill the date of such transmission. If, by the word "transmission" is meant the receipt of the bill by the city authorities, this provision of law would be incapable of enforcement, because the clerk of the house in which the bill originated would not be able to put upon the bill the date when the bill would be received by the

city authorities. This provision of the statute seems to me to be a clear indication of the interpretation of the Legislature of this constitutional provision, as fixing the date of the transmission as the date of the mailing of the bill to the city authorities. While the Legislature cannot by statute modify the provisions of the Constitution, nevertheless the interpretation of the Constitution by the Legislature in passing the bill for the carrying out of the specific provision of the Constitution is, to my mind, of very great, if not controlling significance, in determining that interpretation when the provision shall come before the court for its construction. Of course, if the interpretation given by the Legislature be clearly at variance with the interpretation which the court will put upon the terms used in the Constitution, that interpretation would have less force. Where that interpretation is in doubt the court should adopt the interpretation given by the Legislature, especially where rights secured by the Constitution are safeguarded.

In my judgment the Special Term correctly interpreted the constitutional provision and the order should be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ.,  
concur.

Order affirmed, with ten dollars costs and disbursements.

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ANDREW LEWIS, as Administrator, etc., of JULIUS LEWIS,  
Deceased, Respondent, v. THE STATE OF NEW YORK,  
Appellant.

Third Department, July 7, 1921.

**State — enabling act (Laws of 1918, chap. 611) does not render State liable for death of member of National Guard from injury arising from negligence of decedent while performing act in violation of duty — Legislature cannot direct payment of claim where there is no legal or moral obligation against State.**

An enabling act (Laws of 1918, chap. 611) is invalid which provides for the payment of damages to the widow and child of a member of the National Guard for his death which was caused by his own negligence

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Third Department, July, 1921.

in being drawn up from the floor of the armory to the balcony, by means of a block and fall, 'n clear violation of his duties as a soldier, for such payment would constitute a pure gift in violation of the Constitution; the Legislature cannot direct the payment of a claim where there is no legal or moral obligation against the State.

Moreover, if the validity of the enabling act be conceded, as authorizing the court to give damages for a legal or moral obligation, the evidence does not bring the case within it, as it established that the death resulted in a manner different from that stated in the act.

APPEAL by the defendant, The State of New York, from a judgment of the Court of Claims in favor of the plaintiff for \$5,000, entered in the office of the clerk of said court on the 1st day of September, 1920.

*Charles D. Newton, Attorney-General [Henry C. Henderson, Deputy Attorney-General, of counsel], for the appellant.*

*Kremer & Leavitt [Samuel Leavitt, of counsel] and Brackett, Todd, Wheat & Wait [Benjamin P. Wheat of counsel], for the respondent.*

JOHN M. KELLOGG, P. J.:

The plaintiff's intestate was a member of the National Guard. The company was going into camp "and the various articles belonging to the said company intended to be used at the camp were placed in boxes and lowered from the upper balconies of the said Armory. The said boxes containing said articles were being lowered from the upper balconies to the drill floor of the said Armory, which was a distance of about forty feet, by means of a block and fall. The said Julius Lewis after doing the work on the ground floor of the said Armory, of untying the said boxes from the said hoist and pushing them aside, was, together with other members of the same company, requested by the commanding officer in charge to go to the company room adjoining or near said balcony, there being more work to be done there; and that the said Julius Lewis was thereupon hoisted by means of the said block and fall by two enlisted men, he holding fast to the rope which was connected with the pulley on said block, and as he reached the top balcony, while being so hoisted, he loosened one hand and reached out for the rail of the said



balcony and in so doing slipped and fell to said drill floor, striking the boxes which had been lowered as aforesaid and received the said injuries from which he died as aforesaid." The court found the facts as above, and that there was no evidence tending to show that the State or any officer or representative thereof failed or neglected to perform any duty or obligation which it, or he, owed to the deceased at the time and place of the accident which resulted in his death, and that his death was due to his own carelessness and negligence. It is difficult under *Babcock v. State of New York* (190 App. Div. 147) to see how the State can be made liable for his death.

Chapter 611 of the Laws of 1918, the so-called enabling act, is very broad. It permits the Court of Claims to hear, audit and determine the claim of the widow and daughter against the State "for damages for the death of said deceased, alleged to have been caused by personal injuries alleged to have been sustained by him on or about the thirteenth day of July, nineteen hundred and sixteen, while at work as an enlisted member of the twenty-first company coast artillery corps of the National Guard, New York, in the armory of the ninth coast defense command, at one hundred and twenty-five West Fourteenth street, in the city and county of New York, engaged in hoisting and lowering cases pertaining to his said company or to said armory, or to the military establishment of the State of New York, or to military service, by reason of his being precipitated and falling from above the balcony to the drill floor of said armory and striking his head against a case; that in conducting such hearing, the court shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, but may conduct the same in such manner as to ascertain the substantial rights of the parties; and if the court finds that such injuries were so sustained, damages therefor shall constitute a legal and valid claim against the State, and the court shall award to and render judgment for the claimants for such sum as shall be just and equitable, notwithstanding the lapse of time since the accruing of damages, provided the claim herein is filed with the Court of Claims within one year after this act takes effect."

It is quite evident from the last sentence of the act that it intended to relieve the claimant from default in not filing the claim in time. (See Code Civ. Proc. § 264.) If it intended to go further than that the case must fall within *Munro v. State of New York* (223 N. Y. 208), where it was held that a statute substantially like this did not allow the claim, or compel the Court of Claims to allow it, but permitted the court to hear and determine the case according to the law and equity, and if there was a liability to enforce it against the State. At the most, in the *Munro* case a moral obligation was ripened into a legal claim. If the claimant had been injured in this case while performing a military duty, and without any fault on his part, very probably the case would fall under section 220 of the Military Law which gives a pension.

If there was no moral obligation against the State to make good the loss for his death, there is no reason why it should pay for a death caused by negligence of the deceased and by his clear violation of duty. He was engaged in horse-play, demonstrating to his associates his alertness and courage, and he overestimated himself in that respect. In the *Munro* case, and the other cases where similar legislation has been sustained, there has been an apparent equity in favor of the claim. Here, as matter of fact, there is none. The enabling act foreshadows that the claimant was injured while performing a military duty. The evidence shows such was not the fact, and that he was injured by his own negligence and in disregard of his duties as a soldier. A payment by the State to the widow and child under these circumstances would be a pure gift and in violation of the Constitution.

If we concede the validity of the statute, as authorizing the court to give damages for a legal or moral obligation, the evidence does not bring the case within it, as it established that the death resulted in a manner different from that stated in the act. The Legislature cannot direct or authorize the payment of a claim where there is no legal or moral obligation against the State. It cannot, by declaring that there is a moral obligation, where there is none, create a liability. I favor a reversal and a dismissal of the claim.

All concur.

COCHRANE, J. (concurring):

The enabling act (Laws of 1918, chap. 611) recites that the injuries of the deceased are alleged to have been sustained while "engaged in hoisting and lowering cases" and then provides that "if the court finds that such injuries were so sustained" it shall award judgment in favor of the claimants. The evidence discloses and the court finds that the deceased was not "engaged in hoisting and lowering cases" when he received his injury. The finding is that it was "after the last case or box had been lowered." Nor was he doing anything when injured which was pertinent or incidental to the work of "hoisting and lowering cases." The facts stated in the statute as a condition of a judgment in favor of the claimant having been found not to exist there is no basis for such judgment. I, therefore, agree that the judgment should be reversed and the claim dismissed.

Judgment reversed and claim dismissed, with costs.

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WERTIE LEE DEYOE, as Executrix, etc., of AUGUSTUS DEYOE,  
Deceased, Appellant, v. THE STATE OF NEW YORK,  
Respondent.

Third Department, July 7, 1921.

**Court of Claims — dismissal of claim without findings amounts to nonsuit — highways — State highway maintained under patrol system — claim against State for negligence in failing to maintain guard rail or other barrier on State road at "approach to bridge" — approach to bridge where accident happened was part of highway and not part of bridge and State is liable.**

A judgment entered upon the dismissal of a claim is one of nonsuit where no findings are made.

In an action against the State to recover for the death of the plaintiff's testator alleged to have been caused by the negligence and failure of the State to maintain a guard rail or other barrier on a State road, maintained under the patrol system, at or on the easterly approach of a bridge, the words in the claim "approach to the said bridge" were used in their popular and not in their technical sense as relating to a bridge, and the allegation was intended to convey the idea that it was at the point where the highway approaches the bridge.

On all the evidence, *held*, that the defect in the highway, from a want of barriers, if there was a defect, was the fault of the State and not of the town authorities and that it was error for the court to hold as a matter of law that the State was not liable on the ground that it was the duty of the town superintendent of highways to maintain such barriers.

APPEAL by the claimant, Wertie Lee Deyoe, from a judgment of the Court of Claims, entered in the office of the clerk of said court on the 15th day of July, 1920, pursuant to an order entered in said clerk's office on the same day dismissing the claimant's claim.

*Butler, Kilmer & Corbin* [Walter P. Butler and Harold H. Corbin of counsel], for the appellant.

*Charles D. Newton, Attorney-General* [Carey D. Davie, Deputy Attorney-General, of counsel], for the respondent.

JOHN M. KELLOGG, P. J.:

The claim is that the defendant negligently failed to maintain a guard rail or other barrier on its State road as it enters a bridge, the road being maintained under the patrol system, and that the plaintiff's intestate, by reason of the said negligence, met his death by falling from the road into the stream.

A motion to dismiss the claim was granted. No findings were made. The opinion shows that the claim was dismissed upon the ground that the alleged defect in the highway was upon an approach to the bridge and at a place for which the State is not responsible. (112 Misc. Rep. 423.) The claimant contends that the judgment was a nonsuit, and the respondent justifies the fact that no findings were made by section 1021 of the Code of Civil Procedure, which provided that in case of a nonsuit findings are not necessary. There is, therefore, no difficulty in concluding that the plaintiff was nonsuited. The court does not pass upon the question of the decedent's contributory negligence, or whether or not there was negligence in failing to maintain a barrier on the highway. It is sufficient to say upon those questions that there was at least a question of fact.

The wording of the claim is unfortunate. It alleges that the place where the claim arose was on the State or county highway leading from Saratoga Springs to Schuylerville, at

or on the easterly approach of the bridge, and that the situation was dangerous and was a defect in the highway caused by the defendant's negligence. Evidently the words "approach to the said bridge" in the claim were used in their popular and not in their technical sense as relating to a bridge, but it is distinctly alleged that the defect was in the highway itself, and the allegation was evidently intended to convey the idea that it was at the point where the highway approaches the bridge. There is no question but that was the construction of the pleading by the court and by the parties at the trial. The opinion, which holds that the defect was at "the approach to the bridge," does not refer to the wording of the claim and a little incident of the trial makes it very clear that the word "approach" in the claim did not mislead or cause confusion. At the close of the plaintiff's case the defendant made a motion for a nonsuit to the effect that a cause of action was not alleged and that the court had no jurisdiction. The court endeavored to learn from counsel what the basis of the motion was, but had difficulty. At last it developed that the defects relied upon were that the claim did not state the death of the intestate, or that he left persons who by law are given a cause of action for his death. The court criticised the counsel for concealing the ground of its motion, and permitted an amendment, and then said: "Now, in what other respect is the complaint demurrable?" The defendant's counsel replied: "No other respect." If the complaint had shown that the defect was upon the approach of the bridge, technically so called, the complaint clearly would have been demurrable. It is, therefore, too late to spend any time about the form of the claim.

The bridge, at its highest point, measured from the floor to the top of the ice, was three feet eight inches, and upon the side of the bridge where the accident occurred the ground was substantially level for a long distance. The bridge had been constructed in 1882. At the end was a retaining wall, and the road had been filled in at prior times. When the State began the construction of the State and county highway at this place, the plans and specifications of the work actually embraced the space up to the floor of the bridge. The State construction and care extended only to the floor of the bridge. The State had no right to build a highway upon the approach

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of a bridge if that approach was a part of the bridge. The evidence is, therefore, quite satisfactory that the defect in the highway, from a want of barriers, if there was a defect, was the fault of the State and not of the town authorities. The court determined the question as one of law. We quote the concluding clause of the opinion: "If a guard rail or other barrier was necessary at the approach to this bridge in order to afford reasonable protection against accidents of the nature which caused the death of claimant's testator, it was the duty of the town superintendent, not the State, to provide it."

The judgment and order are, therefore, reversed and a new trial ordered.

All concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

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HARRY SHAPIRO, Respondent, v. ALBANY CHEMICAL COMPANY,  
Appellant.

Third Department, July 7, 1921.

**Negligence — action to recover damages for death of plaintiff's horses caused by chemical in street — purchase of land by plaintiff's employer and defendant from common source — reference in conveyance to map on which street shown — street dedicated to public use but not accepted — boundaries — when boundary presumed to extend to center of street — defendant liable though street not accepted by public authorities nor in general use.**

In an action to recover damages for the loss of plaintiff's horses which became mired in a chemical substance, that, after being deposited by defendant in a liquid state on its own property, flowed onto the street, it appeared that the plaintiff was an employee of a city; that the city and the defendant purchased their land through a common source of title; that the conveyances referred to a map on which the street in question was marked as being a public thoroughfare; that the defendant's conveyance extended merely to the edge of the street; that at the time of the defendant's purchase the street was not in common use but later and at the time of the accident was used by the public to a considerable extent, though it had never been accepted by the public authorities; that the city after the conveyance to the defendant received a conveyance

which gave it permission to lay a conduit through the street and that the plaintiff was engaged in work in reference to the construction of the conduit at the time of the injury to his horses. *Held*, on all the evidence, that the defendant is liable.

Where land is conveyed by a map, and by boundaries which show that it comes to a public street, the presumption is that the grant extends to the center of the street, but this presumption may be rebutted by the circumstances and the terms of the conveyance, and where by the terms of the conveyance the extension of the boundary line at right angles with the street reaches only to the edge of the street, this is an indication that it was not intended to convey any part of the street.

Where premises are conveyed by a map which shows a street named as being dedicated to the public use, each purchaser under the map has an easement to a use of the street for access to his premises.

Notwithstanding the street in question had not been accepted by the public authorities and even though it had not been in general use by the public the relationship of the plaintiff with the parties directly interested in the use of the property as a street was such that he was entitled to assert that the defendant by depositing the chemical on its own property in such a way that it flowed onto the street had violated a duty to him by creating a hidden danger with knowledge of the existence of which it was clearly chargeable.

The creation of this dangerous condition in the street was entirely inconsistent with the rights which the adjoining landowners had in the street and of the right to accept and use the street as a public street. The defendant was bound to exercise its right in a way consistent with the fact that the street had been dedicated for public use and that title to the adjoining property had passed upon the strength of that condition.

APPEAL by the defendant, Albany Chemical Company, from a judgment of the County Court of the county of Albany in favor of the plaintiff, entered in the office of the clerk of said county on the 9th day of October, 1920, on the verdict of a jury for \$626, and also from an order entered in said clerk's office on or about the same day, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*Arthur L. Andrews* [*John J. McManus* of counsel], for the appellant.

*Roland Ford* [*Melvin T. Bender* of counsel], for the respondent.

JOHN M. KELLOGG, P. J.:

The defendant, the owner of the land between South Fifth street, the Hudson river, South Sixth street and Church

street, on Westerlo Island, in the Hudson river near Albany, dumped a tarry and caustic material into the east half of South Sixth street adjoining its land, in such a manner that its nature was not apparent. The plaintiff's horses, while being driven along the easterly side of said street, going towards Church street, became mired in that material, where it had a depth of about five feet, with the result that their death followed, and the plaintiff, upon the theory of negligence, has recovered damages therefor.

The appellant seeks a reversal of the judgment upon the ground that it is the owner of the east half of South Sixth street; that while it was dedicated as a public street, it never has been accepted as such, and that it owed the plaintiff no duty except not to inflict wanton or intentional injury upon him. (*Matter of Ladue*, 118 N. Y. 213; *Weitzmann v. Barber Asphalt Co.*, 190 id. 452.)

The verdict is well sustained by the evidence, and the only question is as to the relative rights of the parties in the street and whether the defendant was negligent as to the plaintiff. He was working in the interest of the city of Albany, which owned the land west of Church street, and also the land east of it — south of South Seventh street. It is assumed that Schifferdecker, a grantee by a conveyance from the same grantor under whom the defendant and the city get their title, owns the lands between South Sixth street and South Seventh street and east of Church street. The Van Rensselaer Land Company is the common source of title; the defendant is the first purchaser from the land company's immediate grantee. All the conveyances are made of the land as laid out on a map on file in the county clerk's office. At the time of the defendant's purchase there were no buildings south of South Fifth street, and no street in common use. The conveyance to the defendant refers to the map, bounds the premises conveyed on the west by South Church street, extended in the manner stated, "and bounded on the north by South Fifth Street, which is at right angles to the east line of Church Street and the middle line of which is distant twenty-three hundred and fifty-seven (2357) feet southerly from the northeast corner of Church and Gansevoort Streets



in the City of Albany, on the east by the Hudson River, and on the south by a line parallel to and at a distance of five hundred (500) feet from the south line of South Fifth Street as designated on said map, containing about six (6) acres of land be the same more or less. Church Street as extended southerly, South Fifth Street and a street at right angles to the east line of Church Street, and adjoining the southerly line of the premises herein conveyed, to be known as South Sixth Street, are all sixty (60) feet in width, and are hereby dedicated, granted and are to remain public streets for public use."

The deed from the Van Rensselaer Land Company, and from its grantees to the parties mentioned, contained the same provisions as to the map and the streets and their dedication. The city of Albany, after the conveyance to the defendant, received a conveyance of the premises west of Church street and south of South Fifth street, together with the right of laying and maintaining a conduit pipe across Church street and through the center of Sixth street, to the Hudson river, for the use of the land conveyed. South Sixth street and South Seventh street have never been accepted as highways by the town.

Where land is conveyed by a map, and by boundaries which show that it comes to a public street, the presumption is that the grant extends to the center of the street. This, however, is a mere presumption, which may be rebutted by the circumstances and the terms of the conveyance. In terms the southerly boundary of the lot is a line parallel to South Fifth street and the street at right angles with the east line of Church street and adjoining the southerly line of the premises conveyed. The north line of South Sixth street is by measurement 500 feet from the south line of South Fifth street. The grantor owned the premises west of Church street and south of South Fifth street. Those facts are indications that it was not intended to convey any part of South Sixth street. (*Kehres v. City of New York*, 162 App. Div. 349; *Fulton Light, H. & P. Co. v. State of New York*, 200 N. Y. 400, 417.)

Where premises are conveyed by a map, which shows a street named which is dedicated to the public use, each pur-

chaser under the map has an easement to a use of the street for access to his premises. (*Bissell v. N. Y. C. R. R. Co.*, 23 N. Y. 61; *Matter of City of New York [Sedgwick Ave.]*, 213 id. 438, 444; *Stillman v. City of Olean*, 228 id. 322, 330.) In ordinary usage such easement is only necessary as to the cross streets, on each side of the lot sold, upon the theory that the parties must have contemplated an outlet both ways. The rule, however, is not arbitrary, but must rest upon the intent of the parties. Here the object of Fifth and Sixth streets was to connect Church street and the lots on those streets and the premises connected therewith with the Hudson river, and the city, as the owner of the land west of Church street, had an easement to cross Church street, and use Sixth street, for access to the river. The city, the defendant and Schiffer-decker had the right of passage on South Sixth street, at all times, irrespective of the question of the acceptance of the dedication. The property was on an island, in a navigable river, and near a large city, and presented favorable sites for mills and factories, and presumably was chiefly valuable for such purposes, and a connection with the river was valuable. The water west of this island was not navigable, and there were no cross streets west of Church street and south of South Fifth street. The map contemplated that the purchasers upon it should have access to the navigable waters by streets running thereto. These questions are discussed because they may be considered material; in my view they are not controlling.

The general situation establishes the defendant's liability. There is evidence in the record sufficient to justify a finding that South Sixth street was used by the public to a considerable extent, and that a line of travel existed along it at the place where the accident occurred. But the exceptions require us to consider what would have been the relation of the parties to each other if we assume that the street had not been in general use by the public. The city of Albany entered upon the premises and built the conduit, and the plaintiff was required, as one of the employees under the city, to go upon the premises and remove a pump, which had been in use on the conduit, and he was performing that duty when the accident happened. If there is a doubt about the right of the land company to convey to the city of Albany the right

to lay and maintain the conduit through the center of South Sixth street, the fact still remains that the city did extend the conduit through the street with the apparent consent of defendant. The extending and maintaining of the conduit through the street necessarily brought about considerable activity upon the street, and involved the use of the street to a greater or less degree, and the laying and maintenance of the conduit was a user of the street for public purposes. (*Matter of Hunter*, 163 N. Y. 542.) The material deposited by the defendant upon the street, when warm, was very liquid. It was carried in a pipe from the works and thrown into a depression upon its own land and flowed on an incline into the street and formed the dangerous condition existing there, rendering the use of the street impossible or dangerous. The defendant knew, or was chargeable with knowledge, of the dangerous condition it was creating. If the street never had been accepted as a public highway, the creation of this dangerous condition in it was entirely inconsistent with the rights which the public and the adjoining landowners had in the street and of the right to accept and use the street as a public street. Clearly the defendant's right in the street must be exercised in a way consistent with the fact that it was dedicated for public use and that title to the adjoining property had passed upon the strength of that condition. Its act rendered the street wholly unfit for public use.

The claim that the public had not accepted the street as a street is not very material as between the grantor, the grantee and their privies and the purchasers of the other property upon the map; the street is a street as to them, and they are entitled to its use. The question of dedication might be important in matters between the defendant and the town, or where the town is sought to be made liable for a want of repair, and perhaps in other cases; but here the plaintiff is so connected with the parties directly interested in the use of this property as a street that he may well assert that the defendant has violated a duty to him when it created this hidden danger in the street. In speaking of a street which had been dedicated but not accepted or used by the public, MASON, J., writing for the court in *Bissell v. N. Y. C. R. R. Co.* (23 N. Y. 61, 66), says: "I certainly am

not able to discover any more intention in the grantor to withhold, in these conveyances, his interest in the land covered by this street, than would be if the public authority had already laid out the street, and the grantor still held the fee subject to the easement. As between these parties, grantor and grantees, it is a public street to all intents and purposes, except that the public authorities are not bound to keep it in repair." It was there considered that the acceptance by the public of the dedication was not necessary to carry the grant to the center of the street, for the reason that as to the parties it was a street.

The judgment and order should, therefore, be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

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JENNIE SMITH, Respondent, v. ANNITA M. BURHYTE and GEORGE D. ALDERMAN, Administrators, etc., of WILLIAM L. PALMER, Deceased, Appellants.

Third Department, July 7, 1921.

**Executors and administrators — action by married woman to recover for services rendered to decedent — evidence not showing that decedent contracted for services — plaintiff not carrying on separate business under Domestic Relations Law, § 51 — husband of claimant not competent witness — rule as to sufficiency of evidence stated.**

In an action against an administrator to recover for services and personal care of the decedent during a period of about five years, it appeared that the decedent was a man of about eighty years of age, without relatives, that the plaintiff and her husband resided on his farm in a house separate and apart from the decedent and that she performed many neighborly acts of kindness for the decedent and furnished him with food from time to time, but that as to the food and services rendered the decedent gave the plaintiff's husband credit. *Held*, on all the evidence, that the judgment for \$1,100 was grossly excessive;

That the husband of the plaintiff was incompetent to give a lump sum value of the plaintiff's services, or if competent, that the evidence shows that his testimony upon that subject was substantially worthless, and that the services were grossly exaggerated.

*Prima facie*, if any obligation was incurred by the decedent, it was to the husband of the plaintiff who was a tenant on decedent's land and not to the wife, and said arrangement did not furnish an independent basis for a recovery by the wife, who was not carrying on any separate business or occupation within the meaning of section 51 of the Domestic Relations Law. Plaintiff's husband was incompetent to give testimony as to transactions with the decedent.

In cases of this character liability should be made out by clear and convincing testimony and the trier of fact has the right to insist that the justice and reasonableness of the claim shall be established by the most satisfactory evidence; the testimony in this case does not come up to the requirements which should control the conscience of the court in determining whether the evidence warrants a recovery.

COCHRANE and KILEY, JJ., dissent.

APPEAL by the defendants, Annita M. Burhyte and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Madison on the 25th day of May, 1920, on the verdict of a jury, and also from an order entered in said clerk's office on the 1st day of June, 1920, denying defendants' motion to set aside the verdict and for a new trial made upon the minutes.

*Carlos J. Coleman* [*Clarence R. Runals* and *Paul P. Cohen* with him on the brief], for the appellants.

*William L. Burke*, for the respondent.

JOHN M. KELLOGG, P. J.:

The plaintiff has recovered a judgment for \$1,100 for her services and personal care of the decedent from March 11, 1914, to October 6, 1919, the day of his death. At the time of his death he was about eighty years of age, unmarried, and had no relatives nearer than a niece. A sister, who had resided about ten miles from him, died March 10, 1914. It does not appear that she was ever a member of his household or rendered him any assistance. He had a little farm, leased to plaintiff's husband, and a house and about two acres of land where he lived. He lived alone and worked the two acres and a half of land, with some assistance from others, raising some potatoes, a little corn and apparently some hay. He died at the barn while he was husking corn. He was around attending to his duties, and in apparently good health

for a man of his age. The plaintiff's husband said that he occasionally had a "give out spell," but for the last year had been better than before, and no "give out spell" is mentioned during that time. He was a miser, and left no debts at the time of his death unless he owed the plaintiff, her husband and her son, each of whom has brought an action against the estate. He was quite a methodical man, kept a diary of all current events and a book of accounts with any one with whom he dealt. There is at least a question if the plaintiff did not, after his death, obtain the account books and keep them. Plaintiff asked permission to keep the diaries, which she had taken possession of, as a memento, and assent was given without examination. She claims that but one book was taken; other evidence indicates there were several. The house was very small; she describes it as follows: "The walls had not been papered in a long time; in fact they were dirty. \* \* \* Mr. Palmer had grown old and he was careless in his habits and he was indifferent to the surroundings of his home and his bedroom had never been papered. I do not know whether it ever had been whitewashed or not. \* \* \* The sheet he had on his bed at the time he died was the covering to an old mattress Mr. Munson's folks had thrown away and tried to burn up. He had rescued the mattress from the flames and had taken it home, and had taken the stuffing out of the mattress. He had washed, in the creek, the covering and put it on his bed. During his last sickness I tried to get him to put on some clean sheets." He kept a cat, and a box full of sawdust was in the house for the use of the cat and in which he expectorated. He never had a doctor. He cooked his own meals, did his own work except as far as plaintiff claims to have assisted him and as other benevolent neighbors sent in provisions for him.

The plaintiff relied upon her husband as the chief witness to prove her case. He was not a fair witness, but sought every opportunity to crowd into the case something which the court had excluded. The court remonstrated with him from time to time and told him he was hurting his wife's case, but finally announced that he would let the witness take his own course, which the witness did. The husband claims that prior to the sister's death they had been good neighbors to

the decedent, had sent him provisions, and that his wife and he had assisted him in various ways, but without any expectation of compensation; they were simply acts of good neighborhood. He says that after the sister's death plaintiff carried in his breakfast that morning; that he was crying and talking about his sister and that he said: "Eva is gone now, I am all alone, you will have to look after me." \* This was at least a queer remark, as the sister had not lived with him or assisted him and he was in his usual health. The plaintiff's entire claim rests, in substance, upon that alleged conversation. Plaintiff and her husband claim it was a hiring of both of them to take care of him and furnish him things. There is no evidence of any change thereafter in his dress, manner of living or the dirty, filthy condition of his house and surroundings. At times he slept on a bunk in the barn. The husband was asked why he did not present his bill to the living man; he answered, "we were to have the pay when he was ready to give it to us; he promised us—[counsel interrupted]. Q. I did not ask you what he promised you. I asked you why you did not present the bill?" The witness did not answer the question. The plaintiff all the while was a married woman, living with her husband, the chief witness, and her son. They lived on a farm, their house being about forty rods from the decedent's house. There were some other neighbors within about an equal distance. The alleged services were of a most trivial nature, when we understand the manner in which the man lived. The principal claim is that frequently the wife carried down to his house a chicken dinner, or some bread, or things which she had cooked at her house, and sometimes carried him things which she cooked at his place. She also carried him milk which the husband sold to him; that she wrote letters for him, although only one person is mentioned to whom a letter was written, and one letter at that; that she drove him to the mill to get a grist ground; that his mail came in their mail box, and the wife or some other member of the family carried it down. Presumably the old miser did not have a very heavy mail. At one time he went to a store kept by a relative of the plaintiff, and in which she at times clerked, and he asked her judgment about a mackintosh and she helped him select one;

that she bought swamp root for him at the store of the relative, and pills and other things, and that she did mending for him. The husband is only able to swear about darning a sweater and sewing an outside pocket on the mackintosh; a neighbor swears that his wife sewed on this pocket. The husband conceded that the old man did a great part of his own mending and that the wife did not do as much for the last year or two. Perhaps this evidence is explained by the fact that the wardrobe was in court, and the husband was asked to examine the stockings and garments and point out anything the wife mended, but was unable to do so, and when a mended sock or article was found he said it was mended by the deceased himself. For sometime prior to his death it is very clear that he did his own mending and darning. The mother of the plaintiff was at her house for a time, and said that she went down during that time with plaintiff to the decedent's house; that she went down because the plaintiff was afraid she would find the old man dead; that she would go to the door, the plaintiff would go in and she would wait until the plaintiff came out and then they would go home. It is said she built the fires for him; the mother swears to plaintiff's building a fire once. There is no doubt but the plaintiff and his wife were kind to the old man, but it is improbable that this old man ever agreed to or expected to pay them, or that they ever expected he would. The services were just the little ordinary services that kind-hearted neighbors would do for an old man. The husband says the decedent had a good broom, but to save it he would always use the old broom, which was of but little value, and that his wife swept for him and made his bed for him at times, and helped him put on his coat and button it when it was cold and his fingers were stiff, and states an occasion of this kind. At another time he says the old man came from the hill, where he had been at work and was caught in a storm, and that she helped to take off his rubber boots and put on some dry stockings. It is unreasonable to suppose that she assisted him to bed, or that she helped dress him, or did any particular amount of sweeping for him. There was no reason why she should; he was well and was running his little place in his own way. She wanted to paper the house but he would not consent.



She brought samples of paper, such as she was using at her house, but he put it off until spring and never papered. As we have seen, the husband kept crowding into the case evidence which was not responsive, and which it was hard to keep out; but in fact his evidence is only material so far as he swears to specific things which he saw done, and when examined as to the particular things the evidence is wanting. The most substantial part of the evidence in favor of the plaintiff is that the mailman at times saw her carrying provisions or other things from her house to his house. During a great part, if not all the time, the husband was working the old man's farm, as he claims, under an agreement that he was to pay the taxes for the use. This does not seem reasonable or probable. One of the diaries or books was found and produced in court. The husband swears that the old man was honest and he never knew of his doing a wrong. The husband and wife recognized the entries as in the old man's handwriting. Among other things, he credits the husband with one dollar for a chicken; this probably accounts for one of the chicken dinners, and with mending, ten cents, probably the darning of the sweater sworn to by the husband; with milk from time to time, and other items, showing clearly that the old man understood that whatever was being done for him was being done by the husband, his tenant, and entered into their accounts. The husband swears that the services of his wife to the deceased were worth ten dollars a week. His attention is called to each item which he swore to, and he is unable to give the value of that service, but he claims the wife took care of the old man and it was worth so much to take care of him, and he had heard it said that a certain man for taking care of a certain person got so much a week, and he mentions two or three instances. It seems incredible that he could give the value of the services by the week. His estimate was upon the theory that the wife had the personal charge of the old gentleman and entirely took care of him, of which there is no substantial evidence.

Upon the merits, if the husband were a competent witness, we arrive at the result (1) that the judgment is grossly excessive; (2) that the husband was incompetent to give a lump-sum value of the plaintiff's services, or if competent, that

the evidence shows that his testimony upon that subject is substantially worthless, and that the services are grossly exaggerated. It does not appear that the house was any better kept, the old man any better cared for, or that he lived in any different way after the death of his sister than he did before, and the claim for compensation for his last sickness is purely fictitious, when we remember the husband swears he was in better health the last year and that he died at the barn while husking corn. The exaggeration of the whole case is fairly illustrated by the claim that she assisted him in husking corn. There was about a quarter of an acre of corn, and nobody knows how much she did towards the husking except for the last year one of the neighbors swears that after the old man's death he husked out the corn and that there was nothing to indicate that any other corn had been husked except the part the old man was husking at the time of his death.

It being conceded that the services prior to the sister's death were gratuitous, it was necessary for the plaintiff to prove a contract, or the basis of a contract, in order to recover. The death of the sister was not an important event as affecting his manner of living, for as we have seen she did not enter into his domestic arrangements. It is seized upon to indicate a change in his method of living and as the basis for the alleged agreement. It is entirely an artificial basis. The alleged statement to the husband and wife, "I am all alone, you will have to look after me," to neighbors who had always gratuitously helped him, is not a hiring or an agreement to pay. If it were, it is not an agreement to pay the wife, but an agreement with the head of the family. The provisions used by the deceased at the plaintiff's house, the provisions carried by her to the house to him, were concededly the husband's provisions and cooked by his wife as a part of her duties in the household. The milk and provisions which were carried were concededly sold by the husband, the owner, and either paid for to him or is in his account which he is making against the estate. The plaintiff all the while was caring for her little family, her husband and son and herself, and was assisting in running their farm. Throughout the husband's evidence he speaks of it as "we are to have

pay," "we are charging;" showing while he has attempted to qualify himself as a witness by showing that the wife did the work; that she is not charging for the provisions, but for carrying them; that he is an interested party; he speaks of it as "their claim" and "their agreement," and that "they were to be paid." *Prima facie*, if any obligation was incurred by the deceased, it was to the husband and not to the wife, and the meager quotations from the books of the decedent show that that was the understanding.

Objection was made that the husband was incompetent to give testimony as to a transaction with the deceased. I think that objection should have been sustained and that a great part of the evidence was erroneously received. The agreement of employment, if made, was the husband's agreement, and for his benefit. The wife was not carrying on any separate business or occupation under section 51 of the Domestic Relations Law, but was a party to the conversation or agreement only as wife. (*Hopkins v. Clark*, 90 Hun, 4; *Birkbeck v. Ackroyd*, 74 N. Y. 356; *Johnson v. Tait*, 97 Misc. Rep. 48; *Gorman v. N. Y., Chicago & St. Louis R. R. Co.*, 128 App. Div. 414; *Stevens v. Cunningham*, 181 N. Y. 454 and cases cited at p. 458; *Holcomb v. Harris*, 166 id. 257.) We quote from *Holcomb v. Harris* (p. 261): "There is no provision in the act of 1884\* affecting the common-law right of a husband to the earnings and services of his wife when not received or rendered expressly upon her sole and separate account. The jury were justified in finding that the wife of the plaintiff rendered these services while living with her husband and under a contract made by the latter with the testator. It follows that this action was properly brought in the name of the present plaintiff."

Under the circumstances, the presumption is strong that the arrangement, if any, was made with the husband as husband, and does not furnish an independent basis for a recovery by the wife. Concededly the husband was a tenant of the farm; he used the barn and had some hay. There was an account with him, and the dealings between him and the

\* See Laws of 1884, chap. 381. Amd. by Laws of 1892, chap. 594; Dom. Rel. Law (Gen. Laws, chap. 48; Laws of 1896, chap. 272), § 21; Dom. Rel. Law (Consol. Laws, chap. 14; Laws of 1909, chap. 19), § 51.—[REP.]

decedent should embrace all the items. The action of the plaintiff is apparently an evasion to get the benefit of the husband's evidence and to exclude a consideration of his dealings with the deceased. The services of the wife in the household, and in connection with the house and with the husband's business, are *prima facie* on his account. The fact that he was the tenant, and had business dealings and accounts with the decedent, adds materially to the presumption.

As we have seen, the husband, although pressed, could give no satisfactory reason why the account was not presented to the decedent in his lifetime. The case rests under a certain suspicion; liability should be made out by clear and convincing testimony. It is easy to prove a claim where the other party is silenced by death. The trier has the right to insist that the justice and reasonableness of the claim shall be established by the most satisfactory evidence. The rule is well understood, and it is only necessary to refer to a few of the many cases upon that subject. (*Matter of Hart v. Tuitt*, 75 App. Div. 323; *Walbaum v. Heaney*, 104 id. 412; *Rosseau v. Rouss*, 180 N. Y. 116, 121; *O'Brien v. Foley*, 150 App. Div. 257, 258; *Apthorp v. Thurston*, 153 id. 572, 576; *McKeon v. Van Slyck*, 223 N. Y. 392.) The case of *Kane v. Smith* (109 App. Div. 163) is quite similar to this, and is very instructive. The testimony in this case does not come up to the requirements which should control the conscience of a court in determining whether the evidence warrants a recovery.

The judgment should, therefore, be reversed upon the law and the facts, and as excessive, and a new trial granted, with costs to the appellant to abide the event.

All concur, except COCHRANE and KILEY, JJ., dissenting.

Judgment and order reversed upon the law and facts and new trial granted, with costs to appellant to abide event. The court disapproves of the finding that the plaintiff rendered valuable services at the request of the decedent; that the decedent agreed to pay her for any services rendered; that the value of the services rendered by the plaintiff to the decedent was \$1,100.

WILLIAM F. GILLIE, Respondent, v. J. FRANK FELLOWS,  
Appellant.

Third Department, July 7, 1921.

**Malicious prosecution — plaintiff, employee of garage company, arrested for procuring return of automobile to garage by false representations — evidence admissible as to good faith of defendant in obtaining possession of automobile from plaintiff's employer on presentation of check for repairs on which payment was subsequently stopped.**

In an action for malicious prosecution it appeared that the plaintiff was an employee in a garage; that the defendant had his car repaired at said garage and gave a check for repairs and removed the car; that the defendant thereafter stopped payment on the check on the alleged ground that the repairs were not properly made; that the plaintiff induced defendant's chauffeur to return the car to the garage on the representation that the defendant had agreed to do so; and that thereafter the plaintiff was arrested. *Held*, that it was an important question in the case whether the defendant had obtained the possession of the automobile from the plaintiff's employer by a trick, in using the check and then stopping payment upon it, or whether he was acting in good faith when the check was given and stopped payment only when he discovered that the plaintiff's employer had not performed his contract, and, therefore, it was permissible to ask the defendant if he was put to expense on account of the condition in which the plaintiff's employer left the automobile.

APPEAL by the defendant, J. Frank Fellows, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Rensselaer on the 14th day of December, 1920, upon the verdict of a jury, and also from an order entered in said clerk's office on the 20th day of December, 1920, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*Lucien E. Clickner*, for the appellant.

*John W. Roddy*, for the respondent.

JOHN M. KELLOGG, P. J.:

The action is for malicious prosecution. The plaintiff is a mechanic and was employed in the garage of George T. Roddy of Troy, and he repaired the defendant's automobile at the

garage. The defendant gave a check for the repairs and removed the car. Later he claims he discovered that the automobile would not run, and he called up the garage and asked where the plaintiff was, saying the car needed fixing, as it would not run. Roddy answered that the plaintiff was not there and he was unable to say when he would be there, and apparently gave no satisfactory answer. Defendant thereupon took the automobile to another garage and stopped payment upon the check. Roddy swears that he accused the defendant of getting the car by a trick, and then stopping payment on the check and depriving him of his mechanic's lien, and that he threatened to take proceedings against the defendant, whereupon the defendant agreed to return the automobile to the garage, and the plaintiff swears that he met the chauffeur on the street and told him that the defendant had agreed to return the automobile to the garage and that the chauffeur backed the car into the garage. The defendant denies this, and claims that the plaintiff, without authority, told defendant's chauffeur that defendant directed the automobile to be returned to the garage, and he accordingly did so, and that Roddy obtained possession of the automobile, after payment had been stopped upon the check, by the false representation of the plaintiff, and that he then consulted his attorney and the police justice, and a warrant for the arrest of the plaintiff was issued on their advice.

It was a very important question in the case whether the defendant had obtained the possession of the automobile from Roddy by a trick, in using the check and then stopping payment upon it, or whether he was acting in good faith when the check was given and stopped payment only when he discovered that Roddy was not performing his contract. The defendant's evidence clearly indicated that he was acting in good faith and that payment was stopped on the check because it was necessary for him to spend money on the automobile to complete Roddy's contract. While attempting to show his good faith, he was asked if he was put to expense on account of the condition in which Roddy left the automobile. The evidence was excluded. The defendant stated that he wanted to show his good faith, as it was claimed that he obtained the automobile from Roddy by a trick. The court ruled that

the defendant could not show his good faith by hearsay testimony, that it was immaterial what the relations were between Roddy and the defendant, or the transaction between them, as it was hearsay as to the plaintiff, saying that good faith could not be shown by the witness testifying to what somebody had told him; that the material question was malice towards the plaintiff, and his relations with Roddy were immaterial. To these instructions the defendant excepted and the exception was well taken.

Quite probably the defendant had no substantial reason to believe that the plaintiff intended to steal his automobile; it is also very probable that no real harm was done to the plaintiff by the arrest. In other words, the arrest and the action both stand upon technical grounds, without real substance. The verdict is excessive, and it is apparent that the defendant was prejudiced by the rulings referred to. The judgment and order are, therefore, reversed upon the law and the facts, and a new trial granted, with costs to the appellant to abide the event.

All concur.

Judgment and order reversed on law and facts, upon the ground that the verdict is excessive, and new trial granted, with costs to appellant to abide event.

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ARTHUR FOWLER, Appellant, v. FRED R. STUART, Respondent.

Third Department, July 7, 1921.

**False imprisonment — complaint sufficient.**

Complaint in an action for false imprisonment in which it is alleged that the defendant, a police officer, without probable cause, maliciously and without a warrant arrested the plaintiff and took him before a police justice, and that the plaintiff was found guilty, but on appeal the County Court reversed the judgment of conviction and discharged the plaintiff, states a cause of action, for the judgment of reversal by the County Court did not destroy the effect of the allegation that the arrest was made without probable cause, and maliciously.

APPEAL by the plaintiff, Arthur Fowler, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Fulton on the 27th day of January, 1921, upon the dismissal of the complaint by direction of the court at the opening of the case.

*W. H. Bass* [*H. D. Wright* of counsel], for the appellant.

*Lee S. Anibal* [*J. Keck* of counsel], for the respondent.

JOHN M. KELLOGG, P. J.:

The complaint alleged that the defendant, a police officer of the village of Northville, without probable cause, maliciously and without a warrant, arrested plaintiff and took him before the police justice; that the case was tried and the plaintiff found guilty and fined ten dollars, but upon an appeal to the County Court the judgment of conviction was reversed and the plaintiff discharged. The answer alleges a proper defense, but the allegations of the answer were not admitted by the defendant's motion for judgment on the pleadings. The judgment must, therefore, rest upon the alleged insufficiency of the complaint. The fact that the County Court reversed the conviction shows that the proceeding had ended. It did not, however, destroy the effect of the allegations that the arrest was made without probable cause, and maliciously. In view of the allegations of the answer, it is probable that the action may not have much merit; nevertheless we must hold that the complaint states a cause of action.

The judgment is, therefore, reversed and a new trial granted, with costs to the appellant to abide the event.

All concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.



FRANK A. McNAMEE, Appellant, v. JOSEPH A. ZIMMETT,  
Respondent.

Third Department, July 7, 1921.

**Insurance — life insurance — action to recover premiums — defense that policies were returned to be canceled — evidence of agreement by soliciting agent to cancel policies inadmissible — letter by defendant showing that he had policies in his possession after he claimed to have surrendered them admissible.**

In an action by a district manager of a life insurance company to recover the premiums on policies of life insurance which he had paid to the company on defendant's policy, it was error to permit the defendant to introduce evidence that he had surrendered the policies to the soliciting agent who agreed to return them to the company and cancel them, over the objection of the plaintiff that no authority was shown in the soliciting agent to make the agreement.

It was error also to exclude from evidence a letter, written by the defendant after he claimed to have surrendered the policies, in which he returned one of the policies to the company and asked to have it canceled, since it tended to show that he did not surrender the policies to the soliciting agent as he claimed.

APPEAL by the plaintiff, Frank A. McNamee, from a judgment of the County Court of the county of Rensselaer in favor of the defendant, entered in the office of the clerk of the county of Rensselaer on the 16th day of September, 1920, upon the verdict of a jury, and also from an order entered in said clerk's office on the 25th day of January, 1921, denying plaintiff's motion to set aside the verdict and for a new trial made upon the minutes.

*George E. O'Connor* [Thomas O'Connor with him on the brief], for the appellant.

*John W. Roddy*, for the respondent.

JOHN M. KELLOGG, P. J.:

The action was brought to recover premiums on policies of life insurance which the plaintiff, the district manager of the company, had paid to the company, the policies having

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Third Department, July, 1921.

been delivered upon the payment of \$150 cash, the remainder to be paid in three quarterly payments thereafter.

The defendant admitted the execution of the policies and the agreement to pay the premiums, but claimed that in September, about a month after the policies were delivered, he surrendered them to the soliciting agent who agreed to return them to the company and cancel them. This evidence was received over the objection of the plaintiff that no authority in the soliciting agent was shown to make such agreement, and exception was duly taken.

The plaintiff offered in evidence an undated letter, which seems to have been written by defendant in January after the policies were issued, returning one of the policies to the company and asking to have it canceled upon the ground that he was not able to make the payments, but saying that he would continue the other policy. This letter was excluded and the plaintiff excepted. It was material as showing that after the defendant claimed he had surrendered the policies to the agent, he returned one of them to the company and asked to be relieved from it, stating that he would continue the other. These rulings call for a reversal of the judgment.

The judgment should, therefore, be reversed and a new trial granted, with costs to the appellant to abide the event.

All concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

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DANIEL J. MEAD, Appellant, v. THE STATE OF NEW YORK,  
Respondent.

Third Department, July 7, 1921.

**Highways — State highway maintained under patrol system — surface waters — action to recover damages caused by flooding plaintiff's land — negligence not shown in construction of culvert.**

In an action to recover damages suffered by plaintiff through the flooding of his land, based on the claim that the defendant negligently elevated the bottom of a drain under a State highway maintained under the patrol

system, to a point where it would not take care of the surface waters, evidence examined, and *held*, that there was no evidence which justified a finding of negligence in the construction of the culvert or that there was anything in the experience of the locality, recent or remote, to indicate that the culvert, which superseded an old one, was not entirely adequate for any fall of water that was to be anticipated.

While it is true that a person constructing a dam or culvert should construct it in such a manner as to resist such extraordinary floods as may be reasonably expected occasionally to occur, it is a question for the triers of fact to determine whether a flood of an extraordinary character was such that it should have been anticipated and provided against.

APPEAL by the claimant, Daniel J. Mead, from a judgment of the Court of Claims in favor of the defendant, entered in the office of the clerk of said court on the 13th day of October, 1920, dismissing the claim of the claimant.

*Young & Young* [W. C. Young of counsel], for the appellant.

*Charles D. Newton*, Attorney-General [*Carey D. Davie*, Deputy Attorney-General, of counsel], for the respondent.

WOODWARD, J.:

The claimant is the owner of a field on which he attempted to raise potatoes in the year 1915. It is the claimant's theory that the State of New York, in constructing a culvert under one of its improved highways, maintained under the patrol system, negligently elevated the bottom of the drain to a point where it would not take care of the surface waters, and that his crop of potatoes was ruined in the year mentioned by reason of the water remaining upon the surface of a considerable part of his field. The learned Court of Claims has made findings of fact and conclusions of law, and dismissed the claim for damages. The claimant appeals.

While the claimant insists that the findings are either not supported by evidence, or are made against the weight of evidence, we are unable from an examination of the record to reach a like conclusion. It is, of course, for the claimant to establish his case by evidence calculated to convince the court, and while some of the evidence is of a negative character we find no fact which is not at least a fair inference from the evidence presented to the court. The claimant, for instance,

claims that there is absolutely no evidence to support the finding of fact that the rainfall at the time of the inundation was unusually heavy, but the claimant himself testified on his direct examination, in answer to the question by his counsel, that only once prior to the year 1915 had his crops been destroyed by excessive water by flood, while the record shows that the culvert was erected in 1908, so that there was a period of six or seven years in which there had been no excessive water doing damage by flood, and the inference is justified that where no damages had resulted in that time from excessive water the condition in 1915 might have resulted from an unusually heavy rain; and while it is probably true that a party constructing a dam or culvert should construct it in such a manner as to resist such extraordinary floods as may be reasonably expected occasionally to occur, it is a question for the jury, or the triers of fact, to determine whether a flood of an extraordinary character was such that it should have been anticipated and provided against. (*New England Brick Co. v. State of New York*, 151 App. Div. 274, 277, and authorities there cited.) Here the evidence is to the effect that there was a rainfall of five and six-tenths inches of water in that vicinity within the period of eight days, which was an unusually heavy rainfall in that neighborhood. The claimant testified that he had been conducting the premises for a period of thirty years, and that only once in that time had there been a flood when the field was planted, and that this was twelve or fourteen years ago, though he was unable to fix the time. How extensive the flood was, whether it was produced by a heavy rain or a blocking of the watercourse in some manner, does not appear; and the explanation of the claimant in his reply brief, unsupported by any testimony in the record to which attention is called, that "we do know that, in the usual rotation of crops, the claimant had this land seeded to grass during these years [from 1908 to 1915] so there were no crops to be destroyed by an overflow," is hardly conclusive upon any issue of fact. There is no evidence in the case which could justify a finding of negligence in the construction of this culvert; no evidence from which a jury would be justified in finding that there was anything in the experience of that locality, recent or remote, to indicate that the culvert,

which superseded an old one, was not entirely adequate for any fall of water which was to be anticipated. The evidence fairly supported the conclusion that the present culvert had at least as great a capacity as the one which preceded it, and the one prior flood is not sufficiently described to warrant any conclusion that it gave any indication of inadequacy in the culvert then existing.

The truth is that whatever the real facts may be; whatever counsel for the claimant believes them to be; the record does not disclose them in such a light as to warrant this court in reversing the findings made by the tribunal specially authorized to pass upon the facts.

The judgment should be affirmed.

Judgment unanimously affirmed, with costs.

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CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant.  
v. THE STATE OF NEW YORK, Respondent.

Third Department, July 7, 1921.

**Taxation — stock transfer tax — voting trust agreement entered into in 1909 — transfer of stock thereunder after amendment of Tax Law, § 270, in 1911 is taxable — constitutional law — taxation under said amendment does not involve obligation of contract.**

Corporate stock, held by trustees under a voting trust agreement executed in 1909 for a period ending in 1914, by the terms of which the trustees were to redeliver the stock to the holders of trustee certificates upon the termination of the contract, is, on the redelivery of the stock, subject to a transfer tax under section 270 of the Tax Law, as amended in 1911, and subsequently re-enacted.

Said statute as amended and as construed to apply to contracts entered into theretofore, does not violate the obligations of contracts within the meaning of the inhibition of the United States Constitution.

**APPEAL** by the claimant, Chicago Great Western Railroad Company, from a judgment of the Court of Claims in favor of the defendant, entered in the office of the clerk of said court on the 7th day of April, 1920, dismissing the claim on its merits.

*Stetson, Jennings & Russell* [George H. Gardiner, William C. Cannon and Theodore Kiendl, Jr., of counsel], for the appellant.

Charles D. Newton, Attorney-General [Edward G. Griffin, Deputy Attorney-General, and George I. Sleicher, of counsel], for the respondent.

WOODWARD, J.:

The claimant is the successor of the Chicago Great Western Railway Company. In the course of the reorganization, which took place in 1909, a voting trust agreement was entered into for a period ending in 1914, and by the terms of this contract the trustees were to redeliver the stock to the holders of trustee certificates upon the termination of the contract period. When this voting trust was created it is conceded there was no provision of law which called for the payment of a tax upon the transfer of the legal title to the owner of the beneficial right; but in 1911 the Legislature amended section 270 of the Tax Law, and it has been held that this amendment operated to tax a transfer such as was involved in the matter now before us (Tax Law, § 270, added by Laws of 1910, chap. 38, as amd. by Laws of 1911, chap. 352; Laws of 1912, chap. 292, and Laws of 1913, chap. 779; *Bonbright & Co. v. State of New York*, 165 App. Div. 640), and it is not questioned that this rule would prevail in reference to any contract made subsequent to the enactment of the amendment. It is urged, however, on this appeal, from an adverse decision of the Court of Claims, that the statute should be construed as prospective in its operation, and not involving the case of an agreement such as was entered into in 1909, upon the theory that otherwise the same would involve the obligation of the contract. (See U. S. Const. art. 1, § 10, subd. 1.) The Court of Claims has refused judgment restoring to the appellant the amount of certain stamps used in transferring the certificates of stock to the original owners, and the claimant appeals to this court.

There is no doubt that at the time these stamps were used the statute in terms required them to be used and canceled in the transfer of the stock. In other words, the Legislature

had, by an amendment, brought within the scope of an excise tax (*People ex rel. Hatch v. Reardon*, 184 N. Y. 431) a transfer of stocks which up to that time had not been subject to taxation, and the claimant urges that this operates as a violation of the obligation of the contract between the owners of the stock and the trustees of the voting trust, who have paid the stamp taxes and been reimbursed, under the terms of the contract, for the necessary expenditures. We apprehend that this is a mistaken view of the constitutional provision suggested. "By the obligation of a contract," say the court in *Nelson v. St. Martin's Parish* (111 U. S. 716, 720), "is meant the means which, at the time of its creation, the law affords for its enforcement;" it is "'the law which binds the parties to perform their agreement.'" (*Bedford v. Eastern Building & Loan Assn.*, 181 U. S. 227, 241.) There was no contract on the part of the State that it would not levy a tax upon the transfer of this stock; there was no law entering into the contract between the parties to the voting trust that the tax laws should remain as they were at that time. The levying of an excise tax upon a privilege afforded by the State of New York to its corporations, or those transacting business within the State, did not in any manner interfere with the carrying out of the contract between the owners of the original stock and the voting trustees. This contract has been performed. The claimant agreed to pay any legitimate expenses involved in the transaction, and these taxes have been paid primarily by the trustees in fulfilling their contract, and ultimately by the claimant. Everything has been done and performed, and the claimant is now seeking to recover a sum of money paid out under the letter and the spirit of the statute as amended in 1911 and since re-enacted and in force when the transfer herein was made.

The judgment appealed from should be affirmed.

Judgment unanimously affirmed, with costs.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of ELLEN BENNETT, Respondent, for Compensation under the Workmen's Compensation Law, for the Death of Her Son, HENRY BENNETT, v. PAGE BROTHERS, Employer, and MARYLAND CASUALTY COMPANY, Insurance Carrier, Appellants.

Third Department, July 7, 1921.

**Workmen's Compensation Law — election to sue third person and subsequent discontinuance of action does not estop claimant from proceeding under statute — limitation of action under Code Civil Procedure, § 1902, not applicable — evidence showing dependency — rule as to sufficiency of evidence.**

A claimant is not estopped from asserting a death claim under the Workmen's Compensation Law by the fact that she elected to sue a third person and after commencing the action against said third person discontinued the same after the Statute of Limitations had run. Section 1902 of the Code of Civil Procedure, limiting the time within which an action for wrongful death must be commenced, has no application to proceedings under the Workmen's Compensation Law.

On all the evidence, *held*, that the claimant established that she was in some measure dependent upon the decedent.

The rule in compensation cases does not require the highest degree of evidence; it is satisfied if there is some evidence of a probative character to support the findings of the Commission.

APPEAL by the defendants, Page Brothers and another, from a decision and award of the State Industrial Commission, entered in the office of said Commission on or about the 9th day of November, 1920.

*James J. Mahoney* [*George J. Stacy* of counsel], for the appellants.

*Charles D. Newton*, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

The claimant's son, Henry Bennett, met with an accident on the 1st of December, 1917, and died on the ninth of



December in the same year. He was at the time in the employ of Page Brothers, but the accident occurred upon the premises of the Metropolitan Tobacco Company, where a heavy iron gate fell upon the claimant's intestate, producing the injuries from which he died. The claimant and her husband, pursuant to the provisions of section 29 of the Workmen's Compensation Law, filed a notice of election with the State Industrial Commission to sue the Metropolitan Tobacco Company for the death of their son. A lawyer was employed and an action was brought against the tobacco company, but was discontinued by consent on the 7th day of June, 1920, two and one-half years after the cause of action accrued, and it is the contention of the appellants, resisting an award subsequently made by the State Industrial Commission to the mother of the decedent as a dependent, that having elected to sue the tobacco company, and such action having been discontinued six months after the Statute of Limitations had run, the claimant is estopped to assert rights under the Workmen's Compensation Law.

We are of the opinion that the appellants misconstrue the provisions of the statute governing this question. It was held in *Travelers Insurance Co. v. Padula Co.* (224 N. Y. 397) that section 29 of the Workmen's Compensation Law created a new cause of action in the dependents, independent of and not created by section 1902 of the Code of Civil Procedure; and we find no limitation upon the right of action within the limits of the act here under consideration. The limitation of a cause of action under section 1902 of the Code of Civil Procedure is undoubtedly an essential element of that cause of action, but it does not extend to other causes of action created by other provisions of law. Besides it is provided by section 29 of the Workmen's Compensation Law that "a compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of \* \* \* the person, association, corporation, or insurance carrier liable to pay the same," and while a discontinuance of an action without results may not be a technical compromise of the cause of action there can be little doubt that the Legislature contemplated that the cause

of action assigned in the very act of electing to accept compensation under the statute (Workmen's Compensation Law, § 29, as amd. by Laws of 1917, chap. 705) should survive for the benefit of whoever should ultimately be entitled to the proceeds. The election on the part of dependents to bring an action against a third party does not operate to relieve the employer or insurance carrier; the statute provides that the insurance carrier "shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case." (§ 29.) The advantage to the dependents is to be found in the fact that if they succeed in recovering more than the amount of the compensation they are at liberty to retain the sum so recovered, with the assurance that if they recover less the deficiency is to be made up to them, and it seems from the discussion in *Travelers Insurance Co. v. Padula Co.* (*supra*) that the assignee of the cause of action takes it with all the rights which any other assignment of a cause of action would carry.

No rights of the appellants being sacrificed by reason of the discontinuance of the action, we are of the opinion that the election to sue the tobacco company, and the subsequent action on the part of the claimant, do not operate to estop her from asserting a claim as a dependent. We are thus brought to consider the further objection that the evidence does not show dependence on the part of the claimant.

While the evidence is unsatisfactory, we are of the opinion that there is sufficient to show that the claimant was in some measure dependent upon the decedent. The rule in compensation cases does not require the highest degree of evidence; it is satisfied if there is some evidence of a probative character to support the findings of the Commission.

The award should be affirmed.

Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of JOHN F. DUNN, Respondent,  
for Compensation under the Workmen's Compensation Law,  
v. BROOKLYN RAPID TRANSIT COMPANY, Employer and  
Self-Insurer, Appellant.

Third Department, July 7, 1921.

**Workmen's Compensation Law — continuing disability — rehearing and further award — evidence not justifying conclusion that claimant was not able to work — when unsworn statement signed by doctor not competent evidence.**

The claimant was injured in February and returned to work in March, one month after the injury, for which loss he was paid, and he continued to work until the last of August when he quit and then asked for a rehearing of his case.

*Held*, that there is no evidence to support the contention of the claimant that he was not able to work at the time he quit and at the time of the rehearing.

An unsworn statement signed by a person purporting to be a doctor, addressed to no one, to the effect that the claimant was not able to work, which did not connect up with the accident in any way, was clearly incompetent as evidence.

JOHN M. KELLOGG, P. J., dissents.

APPEAL by the defendant, Brooklyn Rapid Transit Company, from a decision and award of the State Industrial Commission, entered in the office of said Commission on the 27th day of January, 1921.

*George D. Yeomans* [*Harold L. Warner* of counsel], for the appellant.

*Charles D. Newton*, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

The claimant was injured on the 19th day of February, 1920, and returned to work on the nineteenth of March following. He was paid compensation for the time lost and resumed work. He lost five or six days in the month of May following, though it does not appear clearly that this had

anything to do with the accident, and with this exception continued at work until the 28th day of August, 1920, which date appears to have been the same as the commencement of the general strike of employees of the Brooklyn Rapid Transit Company, when he quit work and has been out of the employment since.

On the twenty-second day of September the claimant wrote the State Industrial Commission a letter, claiming that he had "suffered untold pain and agony" from the time of the accident, and requesting a rehearing of his case. The Commission directed a rehearing, and upon such hearing made a second award for twenty-two weeks of disability at fifteen dollars per week, aggregating \$330, and continued the case. The employer appeals from this award.

Upon the rehearing of this case the claimant testified that he "was not able to work" on the twenty-eighth day of August; that he did not go out on strike on the twenty-ninth of August; that he "was not able to work," but he gives no reason why he was not able to work at that time, and, for all that appears, he may have had a stomachache. At this hearing the claimant also said that "I am not able to work," referring to the time of the hearing; said that his hand was kind of sore and that "my head bothers me — got hit with a heavy gate — three stitches." It was conceded that with the exception of five or six days in May the claimant had worked from the nineteenth of March to the twenty-eighth day of August, and his testimony that he was not able to work is merely his own expression of his feelings, without disclosing any foundation for the conclusion, and if accepted and acted upon is the equivalent of permitting a man to be a judge in his own case. The Commission was not willing, apparently, to make an award upon this testimony, and an examination was ordered. The claimant was sent to the medical department, and upon returning was asked a few questions and then the case was adjourned to permit of an examination by a neurologist.

Dr. Dana, the neurologist, reported. He came to the conclusion that "the man is suffering from a traumatic hysteria with a certain amount of malingering element," which, in plain English, means that the claimant is trying to deceive.

Webster's International Dictionary defines "malingerer" by explaining that in the army "a soldier \* \* \* who feigns himself sick, or who induces or protracts an illness, in order to avoid doing his duty" is a malingerer; hence, in general, one who shirks his duty by pretending illness or inability, and malingering is "to act the part of a malingerer; to feign illness or inability." The doctor continues: "He appears to be very much disgruntled over the way he has been treated and appears to think he should be properly cared for on account of his injury." The report of the doctor is to be construed in the light of this conclusion, for it is based upon the claimant's statements as to the history of his case, and it is clear that the doctor does not believe these statements in full. The doctor says that upon his physical examination he found him "a well-nourished, strong-looking man." He further says: "He claims that he does not feel the prick of a pin over the whole of the lower extremities, but there is no loss of deep sensation. While the man walked about my room holding his arms rigid and did not swing them, I noted that when he was on the street he walked with a perfectly natural gait and swing of arms."

It seems entirely plain that there is nothing in the report which supports the conclusion of the claimant that he was not able to work on the twenty-eighth day of August and at the time of the hearing, and the only other possible foundation is the statement of one signing himself "A. H. Longstreet, M. D." The statement is not sworn to, is not witnessed by any one, and depends for its authority merely upon the signature, which is not identified by any one. This statement reads that "This is to certify that Mr. John F. Dunn is under my care suffering from headaches and insomnia and occasional dizziness on exertion, and while improving does not appear to be able for some time to return to work." This certificate is addressed to no one, does not connect up with the accident in any manner, and is clearly not evidence. Section 72 of the Workmen's Compensation Law provides that "the Commission may cause depositions of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in the Supreme Court," and this clearly excludes the idea that any mere declaration of

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an unidentified person may be used in evidence to establish a right to compensation. There is, therefore, literally no evidence in support of the present award. The vague words of the claimant, supported only by an alleged certificate, unsworn and unauthenticated in any manner, and without apparent reference to the accident out of which the original injury arose, may not be characterized as evidence. (*Matter of Case*, 214 N. Y. 199; *Matter of Jordan v. Decorative Co.*, 230 id. 522, 527.)

No reason, constituting evidence, is given why the claimant did not continue his employment. He had worked for months, with only a few days of interruption, not shown to be due to the accident, and there does not appear to have been any reason why he could not have continued indefinitely. "The statute was not adopted that sloth might be a source of profit." (*Matter of Jordan v. Decorative Co.*, *supra*.)

The award should be reversed and the claim dismissed.

All concur, except JOHN M. KELLOGG, P. J., dissenting.

Award reversed and claim dismissed.

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GOLDYE SIEGEL, Respondent, v. MONROE M. SCHWARZCHILD,  
Doing Business under the Firm Name and Style of M. M.  
SCHWARZCHILD & Co., Appellant.

First Department, July 1, 1921.

**Contracts — action to recover on trade acceptance — goods sold by defendant for plaintiff's assignor — parol evidence admissible that trade acceptance was to be effective only on sale by defendant to third person and to protect plaintiff's assignor against buyer's insolvency.**

In an action on a trade acceptance given by the defendant to the plaintiff's assignor in which it appeared that the goods for which the trade acceptance was given were delivered to the defendant to sell on commission, parol evidence was admissible on behalf of the defendant to show that the trade acceptance was to become effective only in case the goods were sold to a named third person, and that it was to stand as security for the purchase price to protect the seller against the insolvency of said third

person. Such evidence does not alter the contract but establishes a condition preceding the liability upon the trade acceptance. On all the evidence, *held*, that the finding of the jury in favor of the defendant was not against the weight of the evidence.

APPEAL by the defendant, Monroe M. Schwarzschild, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 3d day of December, 1920, upon the verdict of a jury rendered by direction of the court, and also from an order made on the same day setting aside the verdict of the jury in favor of the defendant.

*Edward C. Weinrib* of counsel [*Shaine & Weinrib*, attorneys], for the appellant.

*Morse S. Hirsch* of counsel [*Samuel Meyers* with him on the brief; *Morris & Samuel Meyers*, attorneys], for the respondent.

SMITH, J.:

The action is brought upon a trade acceptance in the sum of \$3,725.45 by the assignee thereof. It seems that the plaintiff's assignor was a maker of shirt waists and he had in his place a large quantity of georgettes, which are pieces of silk. These he wanted to sell. He called his cousin, Lester Wollman, who was working for the defendant, and thereafter made an arrangement with the defendant whereby the defendant should take the silk and sell it for the plaintiff. The commission upon the same is a matter of some dispute, but it is probably immaterial here. The defendant thereafter found one of its old customers in Los Angeles, a man by the name of Obrow, who wanted some of these silks, but would only pay two dollars and thirty-two and one-half cents, while the plaintiff's assignor wanted two dollars and thirty-five cents. It was afterwards agreed that they might be sold for two dollars and thirty-two and one-half cents, and it is claimed on the part of the plaintiff that the commission was increased to three per cent and on the part of the defendant that the commission was decreased from four per cent to three per cent. Plaintiff's assignor did not know this customer, but the defendant did, and plaintiff's assignor was not willing to take

the risk unless the defendant would give him a trade acceptance for the amount of merchandise which is the trade acceptance which was afterwards given, and upon which this suit is brought.

The defendant here defends as against this trade acceptance and seeks to prove that this was given to the plaintiff simply to secure the plaintiff against the insolvency of this man Obrow in case the sale was made to him, and the jury found that such was the fact. The trial judge, however, seems to have held in the first place that this is no defense because it would vary a written contract by parol, and secondly, that the evidence does not support it.

Upon the question as to whether the finding of the jury is against the weight of evidence I think that it was not against the weight of evidence. There was abundant evidence upon which such fact could be found. Here was a delivery of these goods to the defendant to sell on commission. Upon the evidence the commission was changed and the price was changed. It is true that the trade acceptance states that it was made upon the purchase of goods. The statement of the consideration did not bind either party and can be contradicted, while the statement of the obligations of a contract cannot be altered by parol evidence. The evidence was competent to show that the trade acceptance was to become effective only in case the goods were sold to Obrow, and then stand as security for the purchase price. This is not a condition subsequent, it is a condition preceding the liability upon the trade acceptance. Under the authorities this fact may be shown. (*Smith v. Dotterweich*, 200 N. Y. 299; *Grannis v. Stevens*, 216 id. 587; *Title Guarantee & Trust Co. v. Pam*, 192 App. Div. 268, 320.)

The judgment and order should be reversed, with costs, and verdict reinstated, and judgment entered thereon, with costs.

CLARKE, P. J., LAUGHLIN, PAGE and MERRELL, JJ., concur.

Judgment and order reversed, with costs, verdict reinstated and judgment ordered to be entered thereon, with costs.



JULIUS MAUTNER, Respondent, v. CHARLES EITINGON, Individually and as a Surviving Copartner of W. EITINGON & Co., Defendant, Impleaded with MOTTY EITINGON, Appellant. (Action No. 1.)

First Department, July 1, 1921.

**Contracts — contract to share losses in winding up corporation which parties owned is not indefinite — complaint in action to recover for losses not stating cause of action.**

The contract between the parties to this action in reference to the winding up of a corporation in which they held the same number of shares of stock, which was as follows: "We hereby agree to share the losses, whatever they may be, out of the winding up of the F. G. Wright Fur Co. equally," was not so indefinite and uncertain that its meaning could not be understood, for it is evident that the writing did not set forth the entire engagement of the parties, and furthermore the parties acted under it and it has been fully executed except as to the sharing of losses.

The complaint herein which alleged merely that the affairs of the corporation were wound up and settled and that the plaintiff's copartnership suffered a loss of which the sum demanded in the complaint was one-half, was insufficient since the agreement was not that the defendants would pay one-half the losses suffered by the plaintiff, but that they would share equally the losses arising out of the liquidation.

SMITH, J., dissents.

APPEAL by the defendant, Motty Eitingon, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of March, 1921, overruling said defendant's demurrer to the complaint.

*John Schulman* of counsel [*Hays & Wadhams*, attorneys], for the appellant.

*Bertram Sommer*, for the respondent.

PAGE, J.:

The complaint alleges that the defendants, together with one Waldemar Eitingon, now deceased, were copartners, and that the plaintiff and one Ahlsweide were also copartners; and that in October, 1914, the plaintiff's and defendants' copartnerships were holders of stock in equal amounts in a corporation known as the F. G. Wright Fur Company. This

corporation was indebted to the plaintiff's copartnership in the sum of \$59,000, payment of which was demanded. As the corporation was unable to pay, Ahlswede, the plaintiff and defendants entered into an agreement wherein the plaintiff and Ahlswede agreed to forbear from suit on the indebtedness, and it was agreed that the affairs of the said corporation should be wound up and that any loss incurred in the winding up of the affairs of said corporation would be shared equally by the two copartnerships. The only memorandum of said agreement that was reduced to writing was the following:

“ October 8, 1914.

“ We hereby agree to share the losses, whatever they may be, out of the winding up of the F. G. Wright Fur Co. equally.

“ W. EITINGON & CO.

“ MAUTNER & AHLSEWEDE.”

The complaint further alleges that the plaintiff's copartnership forbore from suit; that the affairs of the corporation were wound up and settled; that the plaintiff's copartnership suffered a loss of \$13,913.90, of which sum it demanded one-half, or \$6,956.95, of the defendants; that payment thereof was refused; and that the plaintiff has duly performed all the terms and conditions of the agreement on his part to be performed.

The defendant's demurrer on the ground of insufficiency was overruled. The first point of the appellant is that the contract was indefinite. He treats the written memorandum as the entire contract, whereas it is evident that the writing did not set forth the entire engagement of the parties. The contract was partly oral and partly written, as stated in the complaint. The contract was not so indefinite and uncertain that its meaning could not be understood, for the parties acted under it and it is fully executed except as to the sharing of losses.

But in my opinion the complaint is insufficient. The engagement was not that the defendants would pay one-half of the loss suffered by the plaintiff, but that they would share equally the losses arising out of the liquidation of the corporation. If the plaintiff wound up the affairs of the corporation and paid the debts and thus bore the entire loss

of the corporation, then he would have a right to demand one-half thereof from the defendants. The complaint lacks such allegation. While it may be that the plaintiff suffered a loss, the defendants also may have suffered a loss by the winding up of the corporation.

The order should be reversed, with ten dollars costs, and the demurrer sustained, with ten dollars costs, with leave to the plaintiff to serve an amended complaint within ten days of the service of a copy of the order entered herein with notice of entry thereof, upon payment of the costs hereby imposed.

CLARKE, P. J., DOWLING and GREENBAUM, JJ., concur; SMITH, J., dissents.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, and demurrer sustained, with leave to plaintiff to serve amended complaint on payment of said costs.

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JULIUS MAUTNER, Respondent, v. CHARLES EITINGON, Individually and as a Surviving Copartner of W. EITINGON & Co., Defendant, Impleaded with MOTT EITINGON, Appellant. (Action No. 2.)

[First Department, July 1, 1921.]

**Partnership — simple contract executed by part of partners binds all though sealed — complaint in action for accounting on sealed contract — implied ratification.**

A simple contract executed by a part of the members of a partnership entered into in the course of the partnership business, which is not by law or by the custom of trade required to be under seal, and which would bind the partnership if it were executed as a simple contract, will bind all the partners though there may have been an unnecessary seal attached, and in an action thereon for an accounting, a complaint against all of the partners is good, though it is not alleged that the partner who did not execute the instrument had ratified, approved or confirmed the contract or knowingly received benefits thereunder.

Furthermore, the allegations in the complaint that the parties for several years did business under the contract and that the defendants realized large profits therefrom tend to show that the defendants did, by accepting the benefits of the contract, impliedly ratify it.

APPEAL by the defendant, Motty Eitingon, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of March, 1921, overruling said defendant's demurrer to the complaint.

*John Schulman* of counsel [*Hays & Wadhams*, attorneys], for the appellant.

*Bertram Sommer*, for the respondent.

PAGE, J.:

This action is brought against Charles Eitingon and Motty Eitingon, individually and as surviving copartners of W. Eitingon & Co., for an accounting of a joint adventure, entered into pursuant to a written contract under seal. The complaint alleges that at all the times therein mentioned and at the time of the making of the agreement defendants were with one Waldemar Eitingon, now deceased, copartners doing business under the name and style of W. Eitingon & Co. The agreement, a copy of which is set forth in the complaint, recites that it was made between Waldemar Eitingon of the city of New York and Charles Eitingon of the city of Leipsic, Germany, copartners doing business under the firm name of W. Eitingon & Co., and the plaintiff and one Ahlsweide, copartners doing business under the firm name of Mautner & Ahlsweide; and it is signed and sealed as follows:

" W. EITINGON & CO. (Seal.)

" MAUTNER & AHLSEWEDE (Seal)."

The agreement was terminated by mutual consent on January 1, 1920.

The point urged in support of the demurrer is that the defendant Motty Eitingon is not named as a party to the agreement; and as it is under seal, he cannot be held liable thereon, because the complaint contains no allegation that he ratified, approved or confirmed the contract, nor any allegation that he knowingly received any benefits thereunder. In my opinion the objection is not well founded.

" Each partner possessed the powers the law attributes to a member of a partnership of that nature. Each constituted the other his agent for the purpose of entering into

all contracts for him, and for the partnership, within the scope of the partnership business." (*First National Bank v. Farson*, 226 N. Y. 218, 221.)

The general rule at common law was that one partner had no implied authority, by virtue of the partnership relation alone, to bind the firm or other partners by instruments under seal; hence a sealed instrument executed in the name of a firm by one of its members, without proper authority, where a seal was necessary, was the deed of such member only, and he alone was bound by it. (*Gibson v. Warden*, 14 Wall. 244, 247. The reason of this rule was that as a partnership is ordinarily formed for the purpose of commercial transactions, and the contracts and documents used in such transactions do not require seals, authority to one partner to execute a deed of the property of the copartnership, or a bond, which is required to be under seal, cannot be inferred, but must be specially conferred, or the act subsequently ratified, such instruments not being within the usual scope of the purposes of the partnership. Where a certain class of sealed instruments was ordinarily used in the course of the business to transact which the partnership was formed, so that the use of them was necessary to the transaction of the business, implied power to one partner to execute them in the name of the firm was recognized and his signing and sealing in the firm name bound the partnership and the individual members. Thus a charter party, which is always a sealed instrument, executed by one member of a firm in the partnership name, bound all. (*Striffin v. Newell*, T. U. P. Charlt. [Ga.] 163; 4 Am. Dec. 705.) It logically follows that if the partner executes an instrument which is not by law or by the custom of trade required to be under seal, and which would bind the partners if it were executed as a simple contract, it will bind them, although there may have been an unnecessary seal attached; and the seal is regarded as surplusage. (*Gibson v. Warden*, *supra*; *Worrall v. Munn*, 5 N. Y. 229, 243, and cases there cited.)

Each partner is the general agent of the partnership and of the other members of the firm for the transaction of the partnership business. The contract in this action was a commercial transaction entered into in the course of its

business and for its benefit. A seal was not necessary to give it validity, nor are such contracts usually executed under seal by merchants. It is a case where an agent duly authorized to make the contract placed an unnecessary seal on it. Therefore, Motty Eitingon, being a member of the partnership of W. Eitingon & Co., was bound by the contract although not specifically mentioned therein.

Furthermore, the allegations in the complaint that the parties for nearly ten years did business under the contract and that the defendants realized large profits therefrom and have not accounted to the plaintiff therefor, tend to show that the defendants by accepting the benefits of the contract have impliedly ratified it. The complaint states a cause of action against the defendants.

The order overruling the demurrer and granting leave to withdraw the demurrer and answer is affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ., concur.

Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term.

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MARCUS HELFAND, as Trustee in Bankruptcy of HARSOL COSTUME CO., INC., Respondent, v. MASSACHUSETTS BONDING AND INSURANCE COMPANY, Appellant.

First Department, July 1, 1921.

**Parties — action by trustee in bankruptcy — order staying proceedings until security for costs given — motion to substitute bankrupt as plaintiff after composition and to vacate order requiring security should not have been entertained — motion to dismiss complaint not before court — failure to give notice required by Code of Civil Procedure, § 768.**

Where, in an action by a trustee in bankruptcy of a domestic corporation, an order has been made requiring him to give security for costs and staying all proceedings on his part, except to review or vacate the order, until

said security shall be given, the court should not entertain a motion by the trustee before security was given for the substitution of the bankrupt as plaintiff and to vacate the order requiring security, which was made on the grounds that the bankrupt had made a composition with his creditors and that the trustee had assigned the claim in suit with other assets to the bankrupt, and that as the latter was a domestic corporation, the defendant could not require it to give security for costs, for the motion was clearly in violation of the stay.

Joining with the motion for substitution a motion to vacate the order requiring security did not excuse the violation of the stay, for the right to move to vacate the order, which was reserved from the stay, related to such a motion upon facts which would show that the order should not have been granted in the first instance, while the motion which was made did not question the validity of the order, but was made entirely upon the substitution of the new party, and, therefore, was ancillary to the granting of that motion.

If the bankrupt corporation desires to be substituted in this action, it must come into the case with the burden of and subject to all prior valid orders of the court and must, therefore, give security for costs.

The request made by the defendant in its affidavit in opposition to the motion, that the complaint be dismissed, which was renewed before the Appellate Division, was not properly before the court since the defendant did not comply with section 768 of the Code of Civil Procedure requiring at least three days' notice by an opposing party where he intends to move for a specified relief upon the hearing of the motion.

GREENBAUM and SMITH, JJ., dissent, with memorandum.

APPEAL by the defendant, Massachusetts Bonding and Insurance Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of May, 1921, granting plaintiff's motion to vacate an order for security for costs, permitting service of an amended complaint without security for costs and denying defendant's motion to dismiss the complaint for failure to furnish security for costs.

*Albert J. Rifkind* of counsel [*Thomas T. Reilley* with him on the brief; *Rifkind, Reilley & Schwinzer*, attorneys], for the appellant.

*Alex Davis* of counsel [*David Goldstein* with him on the brief; *Goldstein & Goldstein*, attorneys], for the respondent.

PAGE, J.:

The plaintiff, a trustee in bankruptcy of the Harsol Costume Co., Inc., brought this action to recover on a policy of burglary insurance for a loss sustained by the bankrupt prior to the institution of the bankruptcy proceedings. The defendant immediately applied for and obtained an order requiring the plaintiff to give security for costs and staying all proceedings on the part of the plaintiff and his attorneys, except to review or vacate the order until such security was given. The plaintiff's attorneys obtained several extensions of time to comply with the order, the last of which expired on May 5, 1921. On May 2, 1921, the plaintiff obtained an order to show cause why the Harsol Costume Co., Inc., should not be substituted in place of the plaintiff, and why the order for security for costs should not be vacated. The grounds of this motion were that the said corporation had made a composition with its creditors, and the trustee in bankruptcy, pursuant to an order of the United States District Court, had assigned the claim with the other assets of the said corporation to it, and that as the latter was a domestic corporation, the defendant could not require it to give security for costs. The motion was granted, and from the order this appeal was taken.

The court should not have entertained the motion, as it was clearly in violation of the stay. The action could have been continued by the original party, as the transfer was made after action brought. (Code Civ. Proc. § 756.) The motion was, therefore, one for favor and not of right. Joining with the motion for substitution of party a motion to vacate the order requiring security did not excuse the violation of the stay; for the right to move to vacate the order, which was reserved from the stay, related to such a motion upon facts which would show that the order should not have been granted in the first instance. The motion which was made did not question the validity of the order, but was based entirely upon the substitution of the new party, and, therefore, was ancillary to the granting of that motion. Orders when made must be obeyed, or the penalties for disobedience enforced. If the trustee, because of a transfer of the claim did not desire further to prosecute the action, he could suffer a dismissal of the complaint or give the security and then



move for substitution. If the complaint were dismissed and an action commenced by the corporation, it might be that it could not be required to give security for costs; but if it desires to be substituted in this action, it must come into the case with the burden of and subject to all prior valid orders of the court.

The defendant's attorney at the end of his affidavit in opposition to the motion asked that the complaint be dismissed, and renewed his application in this court. The Code of Civil Procedure (§ 768) provides that the adverse party may, at least three days prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party a notice that he will move for a specified relief upon the hearing of the motion. As the defendant has not complied with this requirement it cannot be granted relief on the plaintiff's motion nor on this appeal.

The order will be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

CLARKE, P. J., and DOWLING, J., concur; SMITH and GREENBAUM, JJ., dissent.

GREENBAUM, J. (dissenting):

Inasmuch as the order granting defendant's motion for security provided "that all proceedings on the part of the plaintiff and his attorneys are hereby stayed except to review or vacate this order," I do not think that the motion to vacate the stay coupled with one to substitute the bankrupt as a party plaintiff constituted a violation of the order staying plaintiff's proceedings. It is apparent that the two motions are intimately related to each other since the reason for moving to vacate the stay was based upon the fact that the plaintiff was no longer interested in the subject-matter of the action and the real party in interest was the bankrupt, to which the claim had been reassigned by order of the Federal court in which the bankruptcy had been pending.

The court which heard the motion was of course cognizant of the stay and in my opinion properly approved of the practice of moving to set aside the stay as a condition precedent for considering the further motion for substitution.

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Of course, two separate motions could have been made, but why should that be necessary when the same result can be accomplished in a simple manner upon a single motion?

I think the order appealed from should be affirmed.

SMITH, J., concurs.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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MAX POTTASH and HARRY POTTASH, Doing Business as POTTASH BROTHERS, Respondents, Appellants, v. THE CLEVELAND-AKRON BAG COMPANY, Appellant, Respondent.

First Department, July 1, 1921.

**Sales — foreign corporation — when contract executed in this State — action to recover purchase price — goods shipped to plaintiffs on bill of lading to order of owner — title did not pass where plaintiffs, without consent of owner, secured possession of bill of lading without paying draft — giving defendant delivery order on forwarding agent did not constitute delivery where order did not specify particular goods — delivery to carrier not delivery to buyer where bill of lading issued to seller — title did not pass where bill of lading issued to seller's order and transferred to bank on payment of draft — remedy of seller, if any, is action for non-acceptance.**

In an action by a non-resident against a foreign corporation to recover the purchase price of goods, the contract will be deemed, for jurisdictional purposes, to have been made in New York where it is shown that the purchase and sale of the goods mentioned was negotiated by brokers in the city of New York and that the bought and sold notes were sent to the respective parties and by them confirmed and returned to the brokers and by them exchanged in the city of New York.

In an action to recover the purchase price of thirty-three bales of burlap, net cash, ex dock Pacific coast, the title to which was not in the plaintiffs at the time the order was taken, it appeared that on the arrival of the goods defendant requested that they be shipped to a third person and the goods were so shipped; that the bill of lading for the goods was made out to the order of the owner and that a draft attached was forwarded to the residence of the plaintiffs for collection; that the plaintiffs did not pay the draft but, without the consent of the owner, caused the bill of lading to be detached from the draft and then drew their own draft on the defendant and attached the bill of lading to it; that the defendant

refused to pay the draft; that the bill of lading was returned to the owner who subsequently sold the goods and retained the proceeds.

*Held*, that the unauthorized separation of the bill of lading from the draft of the owner did not give the plaintiffs title to the goods and, therefore, never having had title, they could not pass title to the defendant, and the court properly directed a verdict for the defendant on this cause of action.

On the second cause of action for the purchase price of one hundred bales of burlap, net cash, ex dock Pacific coast, it appeared that the plaintiffs purchased the goods from a third person; that said third person gave to plaintiffs a delivery order on their custom house broker and forwarding agent; that plaintiffs indorsed this order over to the defendant, attached a draft for the purchase price, and forwarded it through a bank; that the delivery order did not identify any particular bales by marks or numbers to distinguish them from other bales which had been received on the same steamship; that the defendant insisted upon some tangible evidence that the particular goods had arrived and were the property of the plaintiffs; that the goods were finally shipped on bill of lading to the order of the plaintiffs; that on receipt of the bill of lading by the plaintiffs they indorsed it in blank, attached a draft upon the defendant for the purchase price and delivered the draft to a bank, receiving the amount thereof from the bank; that the bank forwarded the draft with the bill of lading attached and was subsequently notified that payment of the draft had been refused.

*Held*, that the delivery order on the custom house broker was not sufficient to constitute a good delivery under the contract inasmuch as the particular bales were not identified by it; that the act of the plaintiffs in indorsing the bill of lading to the bank and receiving from the bank the purchase price had the effect of vesting the title to the goods in the bank.

Had the goods been delivered to the carrier and a straight bill of lading received or a bill of lading to the order of the buyer, then delivery to the carrier would have been delivery to the buyer, but the goods were consigned to the seller and the bill issued to the seller's order, and, therefore, title or right to possession did not pass to the buyer but remained in the seller.

The act of the plaintiffs in presenting the bill of lading with the draft attached through their bank constituted a good tender of performance and under the common law would have enabled the plaintiffs to maintain an action for the purchase price, but under section 144 of the Personal Property Law, an action for the price can be brought only where the property in the goods has passed to the buyer, except where they cannot readily be resold for a reasonable price, and in such a case the seller must notify the buyer that the goods are thereafter held by the seller as bailee for the buyer; the instant case does not come within the exception.

The plaintiffs' right of action, if any, is for damages for non-acceptance of the goods.

APPEAL by the plaintiffs, Max Pottash and another, from so much of a judgment of the Supreme Court, entered in the

office of the clerk of the county of New York on the 29th day of June, 1920, and from so much of an order, entered in said clerk's office on the 8th day of July, 1920, amending said judgment, as confirms the verdict of a jury rendered by direction of the court in favor of the defendant on the first cause of action, and also from so much of an order, entered in said clerk's office on the 28th day of June, 1920, as denies plaintiffs' motion to set aside the verdict and for a new trial on the first cause of action made upon the minutes.

Appeal by the defendant, The Cleveland-Akron Bag Company, from said judgment, and also from so much of said order, entered on the 28th day of June, 1920, as denies defendant's motion to set aside the verdict and for a new trial on the second cause of action made upon the minutes.

*Lawrence E. Brown* of counsel [*Emilie M. Bullowa* with him on the brief; *Bullowa & Bullowa*, attorneys], for the plaintiffs.

*Clifton P. Williamson* of counsel [*James A. Stevenson, Jr.*, with him on the brief; *Alexander & Green*, attorneys], for the defendant.

PAGE, J.:

The first defense to each of the two causes of action alleged in the complaint was that the court did not have jurisdiction because the defendant was a foreign corporation, organized and existing under the laws of the State of Ohio, and was not at the times mentioned in the complaint, or at the time of the commencement of the action, doing business in the State of New York; and the plaintiffs were residents of Philadelphia in the State of Pennsylvania; and the agreement referred to in the complaint was not made and by its terms was not to be performed within the State of New York.

A separate trial of these issues was ordered and upon the trial thereof the justice presiding submitted to the jury the following questions and directed the following answers to be given:

"1. Were the contracts in suit made within the City of New York or elsewhere?

"Answer. In the City of New York.

" 2. Was the defendant doing business in the City of New York at the time of the commencement of this action?

" Answer. No."

The proof was that the purchase and sale of the goods mentioned was negotiated by brokers in the city of New York and that the bought and sold notes were sent to the respective parties and by them confirmed and returned to the brokers and by them exchanged in the city of New York. The contracts were, therefore, made in the city of New York, and the verdict was properly directed.

The remaining issues then came on for trial. The first cause of action was for the purchase price of thirty-three bales of burlap at twenty-two cents per yard, net cash, ex dock Pacific coast, arriving on the steamship *Kangaroo*. It was proved that the defendant was notified of the arrival of the goods and requested that they be shipped to the Chicago-Detroit Bag Company at Goshen, Ind., and the goods were so shipped on September 23, 1918. The goods did not belong to the plaintiffs but to Herman Reach & Co., Inc. The goods were shipped by the latter and the bill of lading therefor was made out to the order of Herman Reach & Co., Inc. On September thirtieth this bill of lading was received by Herman Reach & Co., Inc., in New York city, and on the same day a draft was drawn on the plaintiffs by Herman Reach & Co., Inc., attached to the bill of lading, and forwarded to Philadelphia for collection. On October second the draft with the bill of lading attached was presented to the plaintiffs in Philadelphia. The draft was not paid. The plaintiffs, however, without the knowledge or consent of Herman Reach & Co., Inc., caused the bill of lading to be detached from the draft and then drew their own draft on the defendant and attached the bill of lading to it. The defendant refused to pay this draft and returned it. On October fourteenth the bill of lading was returned to Herman Reach & Co., Inc., their draft on the plaintiffs not having been paid. On this same date the goods arrived at Goshen, Ind., but were not accepted; and subsequently Herman Reach & Co., Inc., sold the thirty-three bales to the Central Bag Manufacturing Company of Chicago and retained the proceeds.

The plaintiffs never had title to the goods and could not

pass title to the defendant. The unauthorized separation of the bill of lading from the draft of Herman Reach & Co., Inc., did not give the plaintiffs title. It was a tortious conversion of the bill of lading. (*Bank of Rochester v. Jones*, 4 N. Y. 497, 501.) In order to maintain an action for the price the seller must prove that the title passed to the buyer. (Sales of Goods Act, Pers. Prop. Law, § 144, as added by Laws of 1911, chap. 571; *Miller v. Ungerer & Co., No. 1*, 188 App. Div. 655, 660.) The plaintiffs clearly had no title to the goods that they could pass. The court correctly directed a verdict for the defendant on this cause of action.

The second cause of action was for the purchase price of 100 bales of burlap at twenty-two cents per yard net cash, ex dock Pacific coast, May and/or June shipment from Calcutta. The goods arrived at Seattle, Wash., on board the steamship *Shimbo Maru* on August 28, 1918. The 100 bales had been the subject of several successive contracts of sale which led to delay, and the case was further complicated by a departure from the terms of the contract with resultant voluminous correspondence. The salient facts of the case follow. The plaintiffs had agreed to purchase these 100 bales from Frame, Leaycraft & Co., who insisted upon payment of cash before they would give a delivery order for the goods to the plaintiffs. This matter was adjusted and Frame, Leaycraft & Co. gave to plaintiffs a delivery order on George S. Bush & Co., Inc., their custom house broker and forwarding agent at Seattle. Plaintiffs indorsed this order over to the defendant, attached a draft for the purchase price, and forwarded it through a bank. This delivery order did not identify any particular bales by marks or numbers to distinguish them from other bales which had been received on the steamship *Shimbo Maru*. The defendant insisted upon some tangible evidence that the particular goods had arrived and were the property of the plaintiffs. As a result of the correspondence between the various parties, Frame, Leaycraft & Co. by telegraph instructed George S. Bush & Co., Inc., to ship the goods. In accordance with these instructions the goods were shipped on September 20, 1918, over the Northern Pacific railway and a bill of lading issued to the order of plaintiffs at Cleveland, notify Cleveland-Akron Bag

Company. This bill of lading was forwarded to the plaintiffs at Philadelphia. Upon receipt thereof the plaintiffs indorsed the bill of lading in blank and attached it to a draft upon the defendant for \$44,000, the purchase price, and delivered the draft to the National Security Bank of Philadelphia, which paid to plaintiff \$44,000 on October 8, 1918. On October twelfth the plaintiffs wrote to the defendant: "As regards to the 100 bales from the S/S *Shimbo Maru*, we have already collected for same, namely \$44,000 from the bank and they will no doubt demand payment upon you for we have nothing further to say on this particular lot." The National Security Bank forwarded the draft with the bill of lading attached to the First National Bank of Cleveland, and was subsequently notified that payment of the draft had been refused. This action was commenced on October twenty-second by attachment.

On the trial the plaintiffs presented two theories of their delivery of the goods by each of two methods of constructive delivery: (1) By giving to the defendant the delivery order; (2) by presenting to the defendant a draft for the purchase price to which was attached a bill of lading showing shipment of the goods to the order of the plaintiffs; and they have argued each of these theories upon this appeal.

As to the first very little need be said. Undoubtedly, if the plaintiffs had delivered to the defendant a sufficient order on the persons having custody of the goods so that on presentation thereof at the dock in Seattle it would have been entitled to the immediate possession of the 100 bales, that would have been a good delivery under the contract, the property in the goods would have passed to the defendant, and the plaintiff could have maintained an action for the price. It was testified by the plaintiffs' expert that to make a delivery order good according to the custom of the trade, the particular bales would have to be specified and distinguished by numbers or marks, and the mere fact that it said on a certain ship would not be sufficient. The plaintiffs' subsequent dealings with the goods entirely negatived the claim that with the delivery of this order title to the goods passed to the defendant. The shipment of the goods to order of the plaintiffs was inconsistent with title in the defendant. Although this may have been an error on the part of George

S. Bush & Co., Inc., nevertheless plaintiff took advantage of the situation, delivered the order bill of lading indorsed in blank to the bank and received the purchase price from it, thereby vesting it with title to the goods, which the plaintiffs could not have done unless they had title. These subsequent acts show that the plaintiffs knew that they had not parted with title by giving to the defendant the delivery order.

*Second.* It may be assumed from the correspondence of the parties that the contract was modified from a delivery "ex dock" to a delivery "f. o. b. Seattle." No claim is made by either party that the plaintiffs were to pay the freight from Seattle to Cleveland. Had the goods been delivered to the carrier and a straight bill of lading received or a bill of lading to the order of the buyer, then the delivery to the carrier would have been a delivery to the buyer. But where, as in this case, the goods are consigned to the seller, and the bill is issued to the seller's order, title or right to possession does not pass to the buyer but remains in the seller. (Pers. Prop. Law, § 101, subd. 2, as added by Laws of 1911, chap. 571; *Boss v. Hutchinson*, 182 App. Div. 88, 90.) The rule was the same prior to adoption of the "Sales of Goods Act." (*Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568, 578.) The plaintiffs cannot claim that their property "shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract" (Pers. Prop. Law, § 101, subd. 2, *supra*), because they exercised the right of disposition, and transferred the title and right of possession to the bank and notified the defendant that "we have nothing further to say on this particular lot." Therefore, title did not pass at all to the defendant. The bill of lading was tendered with a draft attached. The title was then in the bank and would not pass to the defendant except on payment of the draft. (*Commercial Bank of Keokuk v. Pfeiffer*, 108 N. Y. 242, 250; Bills of Lading Act, Pers. Prop. Law, §§ 214, 215, 218, as added by Laws of 1911, chap. 248.) This was a good tender of performance and under the common law of this State would have enabled the seller to maintain an action against the buyer for the unpaid purchase price. It is upon cases



decided before the passage of the Sales of Goods Act that the plaintiffs' counsel relies. Under section 144 of the Personal Property Law (as added by Laws of 1911, chap. 571) an action for the price can be brought only where the property in the goods has passed to the buyer, except where they cannot readily be resold for a reasonable price, but in such a case the seller must notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. The instant case does not come within the exception. The plaintiffs' right of action, if any, is for damages for non-acceptance of the goods. (Pers. Prop. Law, § 145, as added by Laws of 1911, chap. 571.)

At the close of the case both parties moved for the direction of a verdict. The court directed a verdict for the defendant on the first cause of action. This was a correct disposition and leads to an affirmance with costs on the plaintiffs' appeal. The court directed a verdict for the plaintiffs on the second cause of action. This was erroneous. On the defendant's appeal the judgment as to the second cause of action will be reversed, with costs, and judgment ordered for the defendant, with costs.

CLARKE, P. J., DOWLING, MERRELL and GREENBAUM, JJ., concur.

Judgment so far as appealed from by plaintiffs affirmed, with costs; so far as appealed from by defendant reversed, with costs, and judgment ordered for defendant, with costs. Settle order on notice.

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HENRY MINDLIN and LOUIS ROSENMAN, Copartners, Trading under the Firm Name and Style of MINDLIN & ROSENMAN, Appellants, v. MEYER DORFMAN, Respondent.

First Department, July 1, 1921.

**Evidence — admission by party against interest may be proven without warning.**

It is one of the elementary principles of the law of evidence that the statements of a party as to any fact in issue, or relevant to any issue, are admissible as primary evidence against the person by whom they are

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made and it is not necessary, as preliminary to the introduction of such evidence, to ask the party, while on the stand, whether he had made the statements about to be offered as a self-contradiction.

DOWLING, J., dissents.

APPEAL by the plaintiffs, Henry Mindlin and another, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 1st day of November, 1920, upon the verdict of a jury, and also from an order, entered in said clerk's office on the same day, denying plaintiffs' motion for a new trial made upon the minutes.

*Herman Glasser*, for the appellants.

*Arthur Hutter* of counsel [*Kornblueh & Hutter*, attorneys], for the respondent.

PAGE, J.:

The jury rendered a verdict for the defendant, on conflicting evidence. In the course of the trial, after the defendant had given testimony, a witness for the plaintiffs testified that at a certain time and place he had a conversation with the defendant. He was asked, "What was that conversation?" It was objected to as immaterial, irrelevant and incompetent. The plaintiffs' counsel then stated, "I propose to prove an admission against interest." Defendant's counsel said, "But Mr. Dorfman's attention ought to have been called to this." The plaintiffs' counsel then asked the witness, "Did you have any conversation with the defendant regarding the matters in dispute here?" Receiving an affirmative answer he asked, "What was that conversation?" Defendant's counsel said, "The same objection. Mr. Dorfman was on the stand and he could have questioned him about this alleged conversation if he wanted to rebut it." The objection was sustained and plaintiffs' counsel excepted.

The question called for an admission against interest made by a party relating to the matters in dispute. It is one of the elementary principles of the law of evidence that the statements of a party as to any fact in issue, or relevant to any issue, are admissible as primary evidence against the

person by whom they are made. "The rule requiring that the witness must have been warned when on the stand and asked whether he had made the statement about to be offered as a self-contradiction, has always been understood not to be applicable to the use of a party's admissions, *i. e.*, they may be offered without a prior warning to the party." (Wigm. Ev. §§ 1048, 1051.) The reason for the difference in the rule relating to witnesses and parties is that the only object of requiring the warning is to provide a fair opportunity of explanation before the witnesses' departure, whereas a party is in theory present during the trial, and has in fact ample opportunity to protect himself by taking the stand for any explanations which he may deem necessary after hearing the testimony of his alleged admissions. (Id. § 1051.) The learned trial justice erred in excluding the evidence for the reason assigned.

An admission of a party not alone tends to affect the credibility of his testimony, but also the *bona fides* of his entire case. For unless he can show that it was not made, intended or correctly understood, in so far as it affects his liability he is bound by it. (*Raabe v. Squier*, 148 N. Y. 81, 86.) The fact that the admission was against the interest of the party making it adds to its probative value. The exclusion of this testimony was, therefore, prejudicial error and requires a reversal of the judgment.

The judgment and order will, therefore, be reversed and a new trial ordered, with costs to the appellants to abide the event.

CLARKE, P. J., SMITH and GREENBAUM, JJ., concur;  
DOWLING, J., dissents.

Judgment and order reversed and new trial ordered, with costs to appellants to abide event.

BOGERT & HOPPER, INC., Appellant, v. WILDER MANUFACTURING COMPANY, Respondent.

First Department, July 1, 1921.

**Corporations — foreign corporation — service of summons on secretary and treasurer while attending manufacturers' fair in this State — defendant was doing business in this State at time of service.**

The law is well settled that a foreign corporation may not be served with process merely by service upon an officer or agent of the corporation temporarily within the State, unless the corporation at the time is transacting business in this State.

The defendant, a foreign corporation, was transacting business in this State at the time the summons in this action was served on its secretary and treasurer in New York city, where it appeared that at the time of service he with other employees of the defendant was in attendance upon a manufacturers' fair which continued for several weeks; that the defendant, represented by its secretary and treasurer, occupied a room in an hotel, on the door of which was placed a sign bearing defendant's name, and exhibited therein samples of merchandise for sale to jobbers who attended the fair; that said secretary took such orders as he could during the period of the fair, and that the main purpose of the defendant being represented was to take orders for its product.

APPEAL by the plaintiff, Bogert & Hopper, Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of April, 1921, granting defendant's motion to set aside the service of the summons and complaint.

*Thomas P. Hall*, for the appellant.

*George C. Winne* of counsel [*Crim & Wemple*, attorneys], appearing specially, for the respondent.

MERRELL, J.:

The defendant is a foreign corporation, organized and existing under the laws of the State of Missouri, having its office and factory in the city of St. Louis, Mo. The summons and complaint herein was served upon one Oliver Bobe, the secretary and treasurer of the defendant corporation, in the city of New York. At the time of the service of the summons and complaint herein the defendant's said secretary and treasurer, together with an employee of the defendant,

was in attendance at a toy manufacturers' fair held at the Imperial Hotel in the city of New York. The toy fair in which exhibitors from all over the United States attend and exhibit their wares is an annual function, and in 1921 was conducted at the Hotel Imperial, New York city, from February first until March twelfth. The proofs show that several manufacturers were exhibiting their wares at such fair; that the defendant corporation, represented by its said secretary and treasurer, occupied room 239 in said hotel for its exclusive use; that over the outer door of said room the defendant, during said fair, maintained a sign reading, "Wilder Manufacturing Company;" that besides defendant's secretary and treasurer, one George A. Bauer, an employee of said company, was in charge of said room and the merchandise exhibited for sale therein. While said fair was in progress, and on February 7, 1921, the summons and complaint herein was personally served upon said secretary and treasurer of the defendant in New York city. Upon a motion to set aside such service Bobe, secretary and treasurer of the defendant, made an affidavit that the defendant participates once a year in said fair by placing on exhibition at the rooms in which the same is held samples of its merchandise in common with all the principal toy manufacturers in the United States; that said fair is attended by many jobbers and other merchants from all over the United States, and that all of the exhibitors at said fair, including the defendant, take such orders as may be secured from the persons attending the said fair; that none of the merchandise of the defendant on exhibition is for sale and none of it is sold; that every order taken at the said fair is taken to be forwarded to the office of the defendant at St. Louis and there filled and the credit of the purchaser there approved, and that no order thus taken is final or binding until the same has been accepted and the credit of the purchaser approved by the company's office at St. Louis.

The law is well settled that a foreign corporation may not be served with process merely by service upon an officer or agent of the corporation temporarily in the State, unless the corporation at the time is transacting business in the State. (*Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259.)

The only question involved upon this appeal is as to

whether or not, under the circumstances of the present case, it satisfactorily appears that the defendant was, within the authorities, transacting business in the State of New York at the time of the service of the summons and complaint herein upon Bobe, its secretary and treasurer. The answering affidavit of the attorney for the plaintiff herein states that the defendant advertised in trade papers, advertising its complete line of toy merchandise at said fair for sale, and that the said attorney received from Bauer, defendant's employee at said fair, an illustrated catalogue of defendant's merchandise and saw other of said catalogues at said fair apparently for the purpose of distribution and obtaining orders.

It seems to me the affidavit of defendant's secretary and treasurer conclusively proved that the defendant was, through taking orders for merchandise at said fair during the six weeks of its continuance and transmitting the same to the home office of the defendant at St. Louis, clearly doing business in the State of New York. It was said in *Tauza v. Susquehanna Coal Co.* (220 N. Y. 259) that "Unless a foreign corporation is engaged in business within the State, it is not brought within the State by the presence of its agents. But there is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is here [citing cases]. If it is here it may be served."

It clearly appears from the affidavit of the defendant's secretary and treasurer that the main purpose of defendant's being represented at said fair was to take orders for its wares. In so doing, I think that unquestionably the defendant was engaged in transacting business within the State of New York at the time of the service of said summons, and that thereby the court obtained jurisdiction of the defendant.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ.,  
concur.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

ADOLPH BOSKOWITZ, Appellant, v. HYMAN COHN and Others,  
Respondents.

First Department, July 1, 1921.

**Landlord and tenant — action for injunction to restrain tenants from permitting sublessees to continue in possession — provision against subletting without consent of landlord — waiver not defense — fact that landlord would not suffer irreparable damages not defense — relief not dependent upon absence of adequate remedy at law — landlord entitled to mandatory injunction *pendente lite* ousting sublessees — evidence establishing irreparable damage entitling landlord to relief.**

In an action by a landlord for an injunction restraining his tenants from permitting sublessees to continue to occupy certain portions of the premises and from in any manner subletting the premises or any parts thereof without the written consent of the landlord, the landlord is entitled to a mandatory injunction *pendente lite* summarily removing the sublessees from the property, where it appears that the lease contained a covenant prohibiting the tenants from subletting any portion of the premises without the written consent of the landlord and that the landlord did not consent in writing or otherwise to the subletting of a portion of the premises but did in fact refuse such consent when application was made therefor.

The contention by the defendants that the landlord was not entitled to temporary relief because he had suffered a previous subletting and for several months had taken no steps to enforce his rights against the present sublessees cannot prevail, since the landlord unequivocally denies any knowledge of any previous subletting or any waiver of his rights as to the present sublessees, and, moreover, the lease expressly provides that any waiver of a breach shall not affect the rights of the landlord as to any subsequent breach.

It was not a defense to the application for said mandatory injunction *pendente lite* that the landlord would not suffer irreparable damages by continuance of the tenancy of the sublessees, for the landlord is entitled to injunctive relief to restrain occupancy contrary to the express terms of the lease; such relief is in the nature of specific performance and is not dependent upon the absence of adequate remedy at law.

Furthermore, the tenants and their sublessees are not in a position to urge that the landlord will not suffer damages by reason of the subletting for they accepted the lease upon the conditions therein specified and cannot now be heard to dispute the same; the landlord is entitled to insist that his lessees obey the terms and conditions of the lease under which they hold.

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The plaintiff, nevertheless, made out a *prima facie* case showing that he had suffered irreparable damage by reason of the unauthorized acts of the defendants in subletting the premises, and is entitled to relief for that reason.

APPEAL by the plaintiff, Adolph Boskowitz, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of April, 1921, denying plaintiff's motion for an injunction *pendente lite*.

Alfred L. Rose of counsel [Rose & Paskus, attorneys], for the appellant.

Morris M. Baker, for the respondents.

MERRELL, J.:

This appeal is from an order of the Special Term denying plaintiff's motion for a mandatory injunction *pendente lite* summarily removing the defendants Morris Hindin and Charles Hindin from the real property of the plaintiff.

The action is brought to obtain a permanent injunction restraining the defendants Cohn from permitting the defendants Hindin to continue to occupy certain premises owned by the plaintiff and leased to the defendants Cohn, and restraining the said defendants Cohn from in any manner subletting said leased premises or any part thereof without the written consent of the plaintiff first had and obtained, and restraining said defendants from in anywise occupying said premises, except in accordance with the terms and conditions of said lease, and restraining the said defendants Hindin from occupying or continuing to occupy said premises.

The facts upon which plaintiff bases his cause of action and upon which he asks the equitable intervention of the court are as follows: The plaintiff is the owner of a ten-story loft building, situate at 704-706 Broadway, in the borough of Manhattan, city, county and State of New York. The defendants Cohn are copartners doing business under the firm name and style of H. & S. Cohn, and the defendants Morris Hindin and Charles Hindin are also copartners doing business variously under the firm names and styles of Stylart Clothing Company and Hindin Bros. On or about April 7,



1919, the plaintiff executed to the defendants Cohn a written lease of the second loft in plaintiff's said building for the term of two years and nine months, beginning May 1, 1919, and ending January 31, 1922. By the 3d clause of said lease the lessees covenanted with the said lessor not to "use nor suffer to be used, the whole or any part thereof, for any purpose other than the manufacture and sale of clothing, under the penalty of forfeiture and damages." By the 6th clause of said written lease the lessees H. & S. Cohn covenanted and agreed with the plaintiff, as lessor: "Not to assign this lease, nor to sublet the whole or any part of said premises without first obtaining the consent in writing of the lessor, under the penalty of forfeiture and damages," and by the 9th clause the said lessees covenanted and agreed "Not to use the premises or any part thereof, nor permit or suffer their use for any business other than that above particularly described."

The said lease contained the further provision:

"*Conditioned*, that \* \* \* if there shall be any default in any of the covenants or agreements herein contained \* \* \* this lease and the estate hereby demised shall terminate at the option of the lessor, and the lessor and his legal representatives shall have the right to re-enter the said premises, either by force or otherwise, and dispossess and remove therefrom the lessees and their legal representatives or other occupants thereof and their effects, without the said lessor giving the usual statutory notice to quit or any of the notices, or taking any of the proceedings required to be taken by the New York Code of Civil Procedure, the said lessees for themselves and their assigns hereby expressly waiving the same, and without said lessor being liable to any prosecution therefor; \* \* \*." The lease also provided as follows: "The waiver of the breach of any condition or any license dispensing with the performance of any covenant of this agreement, shall not affect the rights of the lessor for any subsequent breach of the same or any other covenant or condition."

Notwithstanding such express conditions of the lease and the covenants therein contained, that the lessees should not sublet the demised premises or assign their lease thereof without first obtaining the consent in writing of the lessor,

in or about the month of January, 1921, the said lessees, H. & S. Cohn, sublet a part of the premises leased to them by the plaintiff to the defendants Hindin Bros. for a term of one year, commencing February 1, 1921, and ending January 31, 1922, and by virtue of such sublease the defendants Hindin took possession and occupied said leased premises. It satisfactorily appears that the defendants Cohn did not obtain any consent, written or otherwise, of the plaintiff to such subletting, and, indeed, that the plaintiff refused such consent when application therefor was made to him by said defendants Cohn. As soon as the plaintiff learned that the defendants Cohn had subleased said premises without plaintiff's consent, the plaintiff refused to accept further rentals of the demised premises, either from the defendants Cohn or their subtenants, Hindin Bros., and in April, 1921, brought the present injunction action. The plaintiff applied to the court for a mandatory injunction *pendente lite* summarily ousting the sublessees from the premises. Plaintiff's application was denied, and from the order denying the same the plaintiff has taken this appeal.

The defendants opposed plaintiff's application for a mandatory injunction *pendente lite* upon the ground that it did not appear that the plaintiff would suffer irreparable damage pending the determination of his action, and in view of the fact that the plaintiff had suffered a previous subletting of a part of the leased premises by the defendants Cohn, and for a period of three months after the defendants Hindin Bros. had taken possession under their sublease of said premises the plaintiff had taken no steps to enforce his claimed rights under said lease, that he should now be denied the temporary relief which he seeks.

I think there is no virtue in the defendants' claim in this respect. The plaintiff unequivocally denies any knowledge of any previous subletting of said premises or of any waiver of his rights with reference to the sublease to Hindin Bros. Moreover, the lease itself provided that any waiver of a breach of any condition or any license dispensing with the performance of any covenant of the lease should not affect the rights of the lessor for any subsequent breach of the same or any other covenant or condition therein contained.

I do not think the defendants should be heard to assert

the claim that the plaintiff should be denied injunctive relief merely because by a continuance of the tenancy of the sublessees he will not have suffered irreparable damage, even though plaintiff had failed to show such damage. The provision against subletting was a condition under which the lease was granted to the defendants H. & S. Cohn, and the lease was expressly conditioned that in case the lessees should make any default in the performance of any of the conditions of the lease then the lessor might re-enter the said premises, either by force or otherwise, and dispossess and remove therefrom the said lessees without recourse to the usual statutory notices or proceedings for the removal of tenants. Inasmuch as it was made a condition of the granting of the lease to the defendants H. & S. Cohn that they should not, without the written consent of the lessor, sublet said premises or any part thereof, the plaintiff was entirely within his rights in asking the court to grant a mandatory injunction summarily ousting the sublessees. The plaintiff was entitled to injunctive relief to restrain occupancy contrary to the terms of the lease. Such relief is in the nature of specific performance and is not dependent upon the absence of adequate remedy at law. (2 Underhill Landl. & Ten. [1909] 756, 1054; *Round Lake Assn. v. Kellogg*, 141 N. Y. 348.) While plaintiff might have taken summary dispossess proceedings or brought ejectment for breach of the conditions of the lease, he did neither, as he evidently did not desire to terminate the lease to the defendants Cohn, and in his prayer for relief in the complaint asks that the defendants Cohn be restrained only from acts violative of the conditions of the lease.

I think it does not lie in the mouths of the defendants to urge that the plaintiff will not suffer damages by reason of the subletting. The plaintiff was the owner of the premises and he had a perfect right to impose such conditions as he saw fit under which he would grant a lease of the premises to the defendants H. & S. Cohn. They accepted said lease upon the conditions therein specified and cannot now be heard to dispute the same. (*Weil v. Abrahams*, 53 App. Div. 316.) This is not a question as to whether the plaintiff has or has not an adequate remedy at law. He is entitled to insist that his lessees obey the terms and conditions of the

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lease under which they hold. (*Chautauqua Assembly v. Alling*, 46 Hun, 582; *Liebmann's Sons Brewing Co. v. Lauter*, 73 App. Div. 183.) The plaintiff, nevertheless, did make out a *prima facie* case upon the trial, showing that he had suffered irreparable damage by reason of the unauthorized acts of the defendants Cohn in subletting said premises, and is entitled to relief for that reason.

It is apparent under the present condition of the calendars in New York county that, unless the plaintiff can obtain the relief by way of mandatory injunction *pendente lite* removing the sublessees of said premises, he will be denied any relief in this action as the lease of Hindin Bros. expires in January next.

The order appealed from should be reversed, with ten dollars costs and disbursements, and plaintiff's motion for a mandatory injunction *pendente lite* be granted, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

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HERMAN SCHOPFLOCHER, Plaintiff, v. THE ESSGEE CO. OF CHINA, INC., Defendant.

First Department, July 1, 1921.

**Sales — action to recover for delay in delivery of goods sold — goods sold in New York city on c. i. f. contract to be shipped from Japan — goods consigned to seller and insured in his name — place of delivery was city of New York — whether buyer called for delivery at seller's place of business is question for jury — measure of damages — market value in New York city at time of breach admissible — facts to be considered in determining whether goods delivered in reasonable time — when buyer entitled to recover.**

In an action by a buyer of goods to recover damages for unreasonable delay in making delivery it appeared that both the buyer and the seller were residents of the city of New York and that the goods were to be shipped from Japan in June, July and August, 1917, in about equal shipments; that the buyer performed his agreement to furnish a letter

of credit and pay the duty on the goods and also paid approximately \$350 in order that the merchandise might be shipped by express from the Pacific coast; that the contract provided that the price stated was "C. I. F. New York;" that the goods were shipped to the seller and were insured in his own name and upon arrival in the city of New York were first stored in the customs warehouse and upon payment of duty were taken to another warehouse where they were deposited and stored in the seller's name and delivery was made by warehouse receipt from time to time.

*Held*, that the "C. I. F. New York" clause in the contract related merely to the price of the goods and that under the facts of the case it was not intended by the parties that the contract was a strict c. i. f. contract under which the buyer would have assumed responsibility for delay in transportation, and, therefore, the place of delivery was at the office or place of business of the seller in the city of New York.

It was incumbent upon the buyer to call upon the seller to deliver the goods to him at the seller's place of business or wherever the goods were in New York city, and whether or not he did so call upon the seller for delivery was a question of fact which should have been submitted to the jury.

On the question of damages the buyer should have been permitted to prove the market value of the merchandise in the city of New York at the time of the alleged breach of the contract.

On the question as to whether there had been an unreasonable delay in the delivery of the goods it was proper to consider the fact that in the usual course of transportation it requires, on the average, about two months for goods to reach New York city from Japan, unless the goods are shipped from the Pacific coast by express, and that the buyer paid approximately \$350 for shipment by express from the Pacific coast.

If the buyer was ready to accept the delivery and the goods were not delivered within a reasonable time, he was entitled to succeed upon proof of his damages.

MOTION by the plaintiff, Herman Schopflocher, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance after the dismissal of the complaint at the close of the plaintiff's case upon a trial before the court and a jury at the New York Trial Term, November, 1920.

*Burnstine & Geist*, for the plaintiff.

*Kramer & Swartz*, for the defendant.

MERRELL, J.:

The action is brought by Herman Schopflocher against The Essgee Co. of China, Inc., to recover damages for an

alleged delay on the part of the defendant in delivering a large quantity of strawbraid purchased under a contract made on or about the 4th day of May, 1917. The contract in question, which was made in the city of New York, mentioned 621 Broadway, room 722, as defendant's place of business, and, so far as material, reads as follows:

" Original NEW YORK, U. S. A., *May 4th*, 1917.

" Sold to

" Mr. M. H. STEINFELS

" 55 Mercer Street

" New York City.

" Bought from The 'Essgee' Co., of China, Inc., Acting Agents for Messrs. Miyake-Gumi Ltd., Kobe, Japan.

" 50,000 Pieces of 3' End Jap Extra Quality at 18½ cents @ piece C. I. F. New York. 4/5 m/m. Artl. No. 3639.

" 50,000 Pieces of 3' End Jap First Quality at 17½ cents @ piece C. I. F. New York. 4/5 m/m. Atkl. No. 3639.

" Duty to be paid by the undersigned purchaser at the rate of 15% upon presentation of Invoices.

" Quality as natural sample shown, usual variations.

" Shipment from Japan June, July, August in about equal shipments.

" Buyer agrees to furnish a letter of credit at 4 months sight draft.

" Accepted

Buyer

" THE 'ESSGEE' CO. OF CHINA, INC.

" D. SCHRATTER,

" *President.*

" Shipment has to be made via overland."

M. H. Steinfels, mentioned in the contract, was a brother-in-law of the plaintiff, and it was conceded upon the trial that the plaintiff was the real party in interest. As provided in the contract, the plaintiff furnished the letter of credit therein referred to and paid the duty on the merchandise, upon a claim made by the defendant that such duty was due. The plaintiff also paid approximately \$350 to the defendant in order that said merchandise might be shipped by express. The goods ran 1,000 pieces to the bale, thus making 100 bales in all.

Evidence was given by the defendant tending to show that the merchandise was shipped from Japan substantially in accordance with the contract, and the defendant claimed upon the trial that had plaintiff called for the goods the defendant would have delivered them within a reasonable time. On the other hand, the plaintiff testified that he was almost an every-day caller at defendant's New York office, and was constantly demanding the goods, which concededly he had paid for, and that he accused defendant's representative of intentional delay and of selling his goods to other parties.

It was established upon the trial that the first of the goods actually came into the plaintiff's possession September 11, 1917, and the last ten bales on August 3, 1918.

The plaintiff claims damages for alleged unreasonable delay on the part of the defendant in delivering the last three lots which were delivered, respectively, on December 13, 1917, February 13, 1918, and August 3, 1918, twenty-six bales in all.

It is the contention of the defendant that under the contract the place of delivery was in Japan, and that it performed its full duty by delivering the merchandise on board ship in Japan. The plaintiff, however, says that the defendant at all times understood that the place of delivery was to be in the city of New York. Plaintiff claims that he is entitled to the damages he has suffered, based upon the market price of the merchandise in New York city.

While the evidence was conflicting respecting the time when the merchandise was shipped from Japan and here received, there is no dispute as to the method of shipment adopted by the defendant.

As above noted, the plaintiff duly delivered to the defendant his letter of credit, thus paying for the goods in advance. The defendant shipped the goods with others from Japan, consigning and insuring them in its own name. Upon arrival in the city of New York they were first stored in a customs warehouse and upon payment of the duty were taken to the warehouse of R. H. Comey & Co. in Brooklyn, where they were deposited and stored in the defendant's name. The defendant did not disclose the name of the plaintiff to the Japanese shipper or to any carrier or warehouseman, and no evidence of title to the goods was delivered to the plaintiff,

except the warehouse receipts for a few bales at a time upon the dates when plaintiff testified he received the goods. It appeared on the trial that someone in the defendant's office had, subsequently to the receipt of the goods, placed plaintiff's name in lead pencil across the face of certain of these bills of lading, evidently for identification purposes.

David Schratter, an officer of the defendant, testified that the plaintiff had requested the defendant to store the goods in the defendant's name and to handle them as the defendant chose. The plaintiff denies this and says that he was constantly demanding the delivery of the goods and that he told defendant's representatives that he would hold them responsible for delay in delivery. From the facts thus disclosed it appears that the parties intended that the merchandise was to be delivered to the plaintiff in the city of New York. The court, however, has held, as a matter of law, that the place of delivery was in Japan, and refused to permit the plaintiff to prove the market value of the merchandise in New York at the time of the alleged breach.

The contract in question, as above set forth, contained the expression, "C. I. F. New York." It was admitted upon the trial that such letters meant, "cost plus insurance and freight to New York." The term appears in the clause of the contract relating to price, and has, therefore, very little bearing upon the question of the place of delivery. (*Miller & Sons Co. v. Sergeant Co.*, 191 App. Div. 814; *Maddaloni Olive Oil Co., Inc., v. Aquino*, Id. 51; *Mee v. McNider*, 109 N. Y. 500; *Seaver v. Lindsay Light Co.*, 111 Misc. Rep. 553.) It is apparent that the term used had a distinct and clear meaning to the parties who used it, and that as used in the contract in question it related purely to the price to be paid. The burden rested upon the purchaser to pay the cost price of the goods in Japan plus insurance and freight to New York. The duty rested, of course, upon the seller to deliver the goods somewhere to the buyer. Had the parties considered that the contract was a strict c. i. f. contract the seller would have insured the goods in the name of the buyer and would have caused the bills of lading to have been made out in his name and forwarded to him, and would have taken the necessary



steps to free the seller from responsibility respecting further delay and delivery.

The respondent seems to rely upon the decision in *Smith Co., Ltd., v. Moscahlades* (193 App. Div. 126) in support of its contention that the place of delivery of the merchandise in question under the contract was Japan. The plaintiff in the last-mentioned case was a Newfoundland corporation, having its office at St. Johns. It had no branch office and transacted no business here. The defendants were engaged in business within the city of New York as importers and exporters of fish. The contract in question used the term, "c. i. f." This court held in respect to the aforesaid contract, as follows:

"This consummated the contract, which became what is known as a 'c. i. f.' contract, which is a well-known form of shipping contract and means that the purchaser pays a fixed price for which the seller furnishes the goods and pays the freight and insurance to the point of delivery, and that all risks, while the goods are in transit, are for the account of the buyer. Under such contracts the seller fulfills all of his obligations by putting the cargo on board and forwarding to the purchaser a bill of lading and a policy of insurance of the kind then current and customarily issued in the trade, and if the goods had not been paid for in advance it was customary to present a draft for the purchase price, accompanied by the bill of lading and policy of insurance and a credit slip for the insurance and freight if not actually paid for by the shipper, which documents were to be delivered to the purchaser on his paying the draft, and the insurance is for the protection of the purchaser, who assumes all risks after the goods have been placed on board; and this constitutes a delivery by the seller under such a contract and title thereupon passes to the buyer even though it be stated in the contract that delivery was to be made at the point of destination."

In the case at bar both the parties resided in the city of New York, and both parties had an office there. The contract did not mention any place in Japan from which the goods were to be shipped, and the seller did not consign the goods to the buyer, but consigned them to itself in the city of New York, insured the goods in the seller's own name, and placed the goods in a warehouse in Brooklyn and took warehouse

receipts in the name of the seller. The term "C. I. F. New York" appears only in that portion of the contract relating to the price. It follows that, under the decision of this court in the case of *Miller & Sons Co. v. Sergeant Co. (supra)* the place of delivery would be at the office or place of business of the seller in the city of New York. Moreover, the seller has so interpreted the contract. Although the plaintiff paid for the goods in advance, the seller never attempted to make any deliveries at any place, except in the city of New York by the delivery of warehouse receipts. It is clearly shown that it was the intention of the parties that the city of New York should be the place where the goods were to be delivered. While the case of *Miller & Sons Co. v. Sergeant Co. (supra)* involved the construction of a contract which used the term "f. o. b.," the same reasoning applies to the use of the term "c. i. f." It was, of course, incumbent upon the purchaser to call upon the defendant to deliver the goods to him at the defendant's place of business or wherever the goods were in Brooklyn. This the plaintiff says he did, and that is a question of fact which should have been submitted to the jury. The place of delivery being in the city of New York, the court should have submitted to the jury the disputed facts, and should have permitted the plaintiff to show the market value of the merchandise in the city of New York at the time of the alleged breach.

It is claimed by the appellant, and seems to have been practically admitted upon the trial, that it requires on the average about two months for goods to reach New York city from Japan, unless the goods are shipped from a Western seaport by express. The defendant admitted that the plaintiff had paid approximately \$350 for shipment by "silk train" (overland express), which fact quite clearly shows that the plaintiff was anxious to receive the goods and to obtain them as early as possible. Such fact also should be considered in determining whether or not the goods were delivered within a reasonable time. The use of the words, "Shipment from Japan June, July, August in about equal shipments," as used in the contract, were clearly inserted to enable the parties, who knew the custom and the length of time it usually takes for a shipment to reach New York, to define

the period within which the goods would in all probability be delivered to the plaintiff. The plaintiff testified, as above noted, that he told Schratter that he must have the goods as soon as possible, and stated: "I want the merchandise during August, September and October to deliver in New York as per my contract, and I will hold you responsible if I don't get it in that time." It is quite apparent that when this conversation took place the plaintiff, at least, expected to receive the goods shipped from Japan in June during the month of August; those shipped in July during the month of September, and those shipped in August during the month of October. If the plaintiff was ready to accept the deliveries and the goods were not delivered within a reasonable time, the plaintiff was entitled to succeed upon proof of his damages.

The plaintiff's exceptions are sustained and plaintiff's motion for a new trial granted, with costs to the plaintiff to abide the event.

CLARKE, P. J., LAUGHLIN, SMITH and PAGE, JJ., concur.

Exceptions sustained and motion for new trial granted, with costs to plaintiff to abide event. Settle order on notice.

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EAGLE MANUFACTURING COMPANY, Respondent, v. ARKELL & DOUGLAS, INC., Appellant.

First Department, July 1, 1921.

**Corporations — foreign corporation — when foreign corporation not doing business in this State within General Corporation Law, § 15 — sales — offering goods for resale amounts to acceptance — receipt and retention of bill of lading for goods shipped f. o. b. point of shipment constitutes acceptance — shipments not required to be made in particular order.**

The plaintiff, a foreign corporation, was not doing business in this State, within the meaning of section 15 of the General Corporation Law, so as to prevent it from maintaining an action to recover for goods sold and

delivered because it had not complied with the provisions of that section, where it appeared that the order for the goods in question was taken by a firm of commission merchants in the city of New York who represented a number of foreign corporations including the plaintiff; that the plaintiff had nothing whatever to do with the running of the New York office or its expenses and contributed nothing towards its maintenance; that the only goods of the plaintiff in the possession of the commission merchant were samples which had a nominal value only; that the order taken by the commission merchant was subject to the approval of the plaintiff and that the plaintiff never had any stock of merchandise in this State nor any bank account, nor any office, nor did it keep any books within the State.

As to the defense interposed by the defendant that the plaintiff failed to ship the goods in the manner agreed upon in that the three orders in question were not shipped in the order required by the defendant, it appeared that the time for shipment was extended by the defendant and that thereafter the defendant authorized the plaintiff to ship the goods as soon as possible, and that, as to the first shipment, the defendant offered the goods subsequently for resale. *Held*, that the defendant, by offering the goods for resale, exercised dominion over them and acceptance must be deemed to follow as a matter of law.

As to the remaining shipments the invoices and bills of lading for them were forwarded at the same time that the goods were shipped and the documents were received and retained by the defendant, and furthermore delivery was established by the additional circumstance that the goods were sold f. o. b. the point of shipment which became the place of delivery, and by the further fact that the goods were shipped on the express authorization of the defendant after it was notified that they were ready for shipment.

The defendant's authorization of delivery does not warrant the conclusion that the shipments were to be made in the order of time in which the contracts of sale were made.

DOWLING and PAGE, JJ., dissent in part, with memorandum.

APPEAL by the defendant, Arkell & Douglas, Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 4th day of March, 1921, upon the verdict of a jury rendered by direction of the court.

*Emil Weitzner* of counsel [*David Steckler* with him on the brief; *Steckler & Weitzner*, attorneys], for the appellant.

*Ludwig M. Wilson*, attorney for the respondent.

GREENBAUM, J.:

The complaint alleges the sale and delivery of merchandise to defendant between October 7, 1920, and November 4, 1920, at the agreed price of \$2,802.01.

The answer denies the allegations of sale and delivery and for a first and separate defense alleges that the plaintiff is a foreign stock corporation doing business in this State which has failed to comply with the provisions of section 15 of the General Corporation Law (as amd. by Laws of 1917, chap. 594). For a second separate defense the answer alleges that the merchandise in suit was purchased on or about the 10th of March, 1920, pursuant to three orders marked Exhibits "A," "B" and "C," respectively, providing for the delivery of the goods mentioned in Exhibit "C" in May and of the remainder in July or August; that plaintiff failed to make delivery at the time fixed; that on August fourth plaintiff agreed to ship said goods as soon as freight conditions permitted, those in Exhibit "C" to be shipped first and the others soon thereafter, and that on September twenty-ninth, relying upon such promise defendant extended the time of shipment of the goods, but that the plaintiff failed to ship the goods in the manner agreed upon and by reason thereof the defendant refused to accept delivery.

As to the defense that the plaintiff was doing business in this State in violation of the statute, the facts are as follows: The orders were taken by the firm of Malone & Nicholson, who were engaged on their own account in business as commission merchants in the city of New York. They represented a number of foreign corporations having factories, including the plaintiff. The lease of the premises 50 Park Place, occupied by Malone & Nicholson, was in their own name as was also the telephone contract; both lease and telephone contract were put in evidence. Plaintiff had nothing whatever to do with the running of the New York office or its expenses and contributed nothing towards its maintenance. Malone & Nicholson employed their own help and paid all their expenses. The only goods of the plaintiff in the possession of Malone & Nicholson were samples which had only a nominal value. The goods sold never passed through Malone & Nicholson's hands. The orders that were accepted by

them were subject to approval of the plaintiff Eagle Manufacturing Company. The plaintiff never had any stock of merchandise in the State of New York, nor did it have any bank account here, nor had it any officer in the State of New York, nor did it keep any books in the State. The merchandise involved in this suit was sold f. o. b. Wellsburg, W. Va. We think the foregoing state of facts, which are uncontradicted, establishes as matter of law that the plaintiff was not doing business in this State as contemplated by the statute. (*Burrowes Co. v. Caplin*, 127 App. Div. 317; *Rundle Spence Mfg. Co. v. Gainsborough Const. Co.*, 123 N. Y. Supp. 785; *Brookford Mills, Inc., v. Baldwin*, 154 App. Div. 553; *Hovey v. De Long Hook & Eye Co.*, 211 N. Y. 424.)

As to the defense that the plaintiff failed to ship the goods in the order in which defendant claims they should have been delivered, the facts are as follows: There were three orders and three shipments known respectively as A-68; A-70 and A-67. On September eighteenth defendant was notified that these orders were ready for shipment at the plaintiff's factory, and on September twenty-ninth the defendant authorized the plaintiff to forward the goods to New York as soon as possible. As to the order A-68 aggregating \$1,386 the goods were shipped on October 12, 1920, and subsequently they were offered for resale by the defendant to one W. H. McNutt on October 28, 1920. The defendant thus exercised dominion over these goods and acceptance must be deemed to follow as matter of law. Besides, the invoice bears defendant's notation showing that the various items had been checked up and a discount of \$26.40 had been deducted from the payment.

As to the orders A-67 and A-70, representing, respectively, \$433.12 and \$945, they were shipped October 21 and 28, 1920. The invoices and bills of lading for these orders were forwarded at the same time that the goods were shipped and the documents have ever since been retained by the defendant.

It seems to us that in addition to the facts just alluded to, the delivery was established by the additional circumstance that the goods were sold f. o. b. Wellsburg, which became the place of delivery and that defendant was notified that the goods were ready for shipment and that it replied that they might be shipped and they were shipped. There was nothing

in the defendant's authorization of delivery that would warrant the conclusion that the shipments must be made in the order of time in which the contracts of sale were made.

As there was no issue of fact to be submitted to the jury, the court was justified in directing a verdict.

The judgment is affirmed, with costs.

CLARKE, P. J., and SMITH, J., concur; DOWLING and PAGE, JJ., dissent.

DOWLING, J. (dissenting):

I dissent, upon the ground that the plaintiff, in my opinion, is not entitled to recover herein for the reason that it was a foreign stock corporation doing business in this State when the contracts in suit were entered into and had at that time no certificate as required by section 15 of the General Corporation Law (as amd. by Laws of 1917, chap. 594).

PAGE, J., concurs.

Judgment affirmed, with costs.

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ANNA McNALLY, INC., Appellant, Respondent, v. WILLIAM W. CHAPIN, Respondent, Appellant.

First Department, July 1, 1921.

**Depositions**—deposition for plaintiff taken without State not signed by witness and filed without notice one year after examination—motion to suppress within one month thereafter withdrawn by consent and presented to trial justice—deposition admitted on trial—on retrial after disagreement question as to admissibility of deposition was before court—defendant not guilty of laches in moving to suppress deposition—deposition not admissible because not signed by witness as required by Code of Civil Procedure, § 901, subd. 2.

In an action to recover for clothing alleged to have been sold to the defendant's former wife it appeared that the deposition of the wife was taken without the State on the application of the plaintiff; that the witness did not sign the deposition which, together with the certificate of the commissioner to the effect that he could not procure the signature, was

filed about one year after the examination and without notice to the defendant's attorney; that within one month thereafter the defendant's attorney moved to have the deposition suppressed on the ground that it was not executed in accordance with the statute; that said motion was withdrawn on consent and presented to the justice at the trial of the case; that the deposition was admitted over objection of defendant's counsel; that the first trial resulted in a disagreement and on a retrial the justice refused to consider the motion to suppress the deposition on the ground that it had been decided by the former trial justice and also because the application made by the defendant showed on its face that defendant's counsel was guilty of laches in making the same.

*Held*, that the question as to whether the deposition was properly executed and admissible in evidence was before the trial justice on the retrial, who had the power to dispose of it upon appropriate objections made, regardless of the acts of the judge presiding at the previous trial, since the motion originally made at Special Term was withdrawn upon consent and the entire question was submitted to the trial court to be disposed of at the trial and there was no order entered upon the trial court's ruling on the first trial denying the motion to suppress and overruling the objections to the admission of the deposition.

The trial court erred in holding that the defendant's counsel was guilty of laches in moving to have the deposition suppressed.

The deposition was not admissible in evidence since there was not a compliance with the provision of subdivision 2 of section 901 of the Code of Civil Procedure that after the deposition "has been carefully read, to or by the witness, it must be subscribed by the witness."

CROSS-APPEALS from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 4th day of June, 1920, upon the verdict of a jury.

Appeal by the plaintiff, Anna McNally, Inc., from an order, entered in said clerk's office on the 2d day of June, 1920, denying plaintiff's motion to set aside the verdict and for a new trial made upon the minutes.

*Arthur B. Hyman* of counsel [*Julian T. Abeles* with him on the brief; *Paskus, Gordon & Hyman*, attorneys], for the plaintiff.

*Elbridge L. Adams* of counsel, for the defendant.

GREENBAUM, J.:

The action was brought to recover the sum of \$7,487.70, the reasonable value and agreed price of dresses and other



wearing apparel alleged to have been sold and delivered to the former wife of the defendant by plaintiff and Anna McNally, its predecessor in business, between the 20th of July and the 25th of November, 1916.

The defendant's answer sets up the defense that the goods so sold and delivered were not necessities; that they were furnished solely on the credit of his wife; that she had an allowance sufficient to supply her needs, considering the means and station in life of the defendant, and that after the 20th of September, 1916, defendant gave notice to the plaintiff that he would not be responsible for any debts contracted by his wife thereafter. The defendant's appeal is based upon the ground that the court erred in receiving a deposition of his former wife taken in behalf of plaintiff at San Francisco, Cal. Plaintiff appeals because of asserted errors in the charge of the learned court and its rulings upon the admission of evidence and upon the ground that the verdict was the result of a compromise.

In support of its case the plaintiff was permitted to read in evidence, over the objection of defendant, the afore-mentioned deposition under the following circumstances: It was taken upon interrogatories annexed to a commission dated November 14, 1918, issued to a notary public in and for the county and city of San Francisco, State of California. The certificate of the commissioner, dated March 11, 1920, which was attached to the commission, upon its return states that the witness appeared before him on the 11th day of February, 1919, at his office and that after being sworn "did depose to the matters contained in the foregoing deposition," but that the witness did not subscribe to the deposition, nor indorse the exhibits annexed thereto, although he knows that the answers therein are true of his own knowledge. His certificate also states: "She left my office after the taking of the said deposition, advising me that she would return the following day, after the same had been transcribed by the stenographer, for the purpose of signing the same. She did not return to my office on the following day or thereafter, and although I have kept the deposition for a great length of time and diligently endeavored in every manner to locate the said witness by going to her last known place of residence in this city,

and making inquiries of her through various persons with whom she was acquainted, I was nevertheless unable to locate her and have not since been able to locate her and have been advised that she is no longer in the State of California or in the United States, but is in Europe. Wherefore, I have been obliged to return the commission with this deposition annexed thereto unsubscribed by the witness."

The commission was not filed in the office of the clerk of New York county until the 24th of March, 1920, which was upwards of thirteen months after the witness appeared for examination in San Francisco. After learning quite accidentally that the commission had been filed, defendant's counsel made a motion dated April 12, 1920, to suppress it on the ground that it had not been executed in accordance with the statute.

Upon the return day of the motion the justice holding Special Term, with the consent of both parties directed that the motion be withdrawn and presented to the justice of the Trial Term, it having been stated that the cause would be shortly called for trial during the April term of the court. The case came on for trial on April twenty-first, and the learned justice then presiding permitted the deposition to be read over the objection of defendant's counsel, with the instruction to the jury that they were to take into consideration the fact that "after it was written out it was not read over to the witness and that it was not signed by the witness." The result of this trial was a disagreement. The cause reappeared on the day calendar before another trial justice, who held that he would not consider the motion to suppress because that had been decided by the former trial justice and also because the application made by the defendant showed upon its face that defendant's counsel was guilty of laches in making the same. The record, however, shows that the motion originally made at Special Term was withdrawn upon consent and the entire question was submitted to the trial court to be disposed of upon the trial. There was no order ever entered upon the trial court's ruling denying the motion to suppress and overruling the objection to the admission of the deposition.

The question as to whether the deposition was properly

executed and admissible in evidence was before the trial justice who had the power to dispose of it upon appropriate objections made, regardless of the action of the justice presiding at a previous trial.

We think that the learned court erred in holding that the defendant's counsel was guilty of laches. It appears that both parties recognized that the deposition was incomplete. It also appears that six or eight months before the trial the plaintiff made a motion for the issuance of a new commission, which was granted, but it was never taken. Defendant's counsel was lulled into the belief that the incomplete deposition would not be filed. He quite naturally was surprised to learn that the deposition which was taken in February, 1919, was filed on March 24, 1920, without any notice being given to him thereof.

The question, therefore, was squarely before the trial justice as to whether the deposition was entitled to be read in evidence. Subdivision 2 of section 901 of the Code of Civil Procedure provides with reference to depositions taken outside of the State that a person to whom a commission is directed "must reduce the examination of each witness to writing, or cause it to be reduced to writing, by a disinterested person. After it has been carefully read, to or by the witness, it must be subscribed by the witness." Concededly, there was no compliance with the statute.

It has repeatedly been held in this State that the failure of a witness to read or subscribe his deposition after it has been reduced to writing necessitates its rejection upon objection made. (13 Cyc. 939; 18 C. J. § 239; *Faith v. Ulster & Delaware R. R. Co.*, 70 App. Div. 303; *Foster v. Bullock*, 12 Hun, 200; *Lowther v. Sullivan*, 63 Misc. Rep. 51.) The same rule has been recognized in other jurisdictions. (*Winooskie Turnpike Co. v. Ridley*, 8 Vt. 404; *Zehner v. Lehigh Coal, etc., Co.*, 187 Penn. St. 487, in which the court emphasized the importance of strict observance of such requirements; *Arnold v. Kearney*, 29 Fed. Rep. 820; *Bell v. Chambers*, 38 Ala. 660.)

Plaintiff's counsel cites a number of cases promulgated over a century ago, such as *Moulson v. Hargrave* (1 S. & R. [Penn. 1814] 201); *Graham v. Hackwith* (8 Ky. [1 A. K. Marsh.] 423) and *Mobley v. Hamit* (Id. 590) (both in 1819), in which

the courts held contrary to the later rulings. There was nothing to indicate in these cases that any statute governing the taking of depositions then existed.

In other cases cited by the plaintiff's counsel it appears that there was no statute requiring the signature of the witness to the deposition. (*Brinkley v. Bell*, 131 Ga. 226; 62 S. E. Rep. 67.)

The objection was not a mere irregularity. It was based upon a matter of substance which was important to the defendant. In a number of the above-cited cases the courts have observed that they cannot be too careful in surrounding the taking of depositions with all the safeguards and solemnities which may tend to insure their truthfulness and authenticity.

Since we are constrained to reverse the judgment upon defendant's appeal, it is unnecessary to consider the appeal of the plaintiff. The judgment and order are reversed and a new trial ordered, without costs to either party.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ.,  
concur.

Judgment and order reversed and new trial ordered, without costs to either party.

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HEYMAN COHEN & SONS, INC., Respondent, v. M. LURIE  
WOOLEN Co., INC., Appellant.

First Department, July 1, 1921.

**Sales — option to make additional purchases indefinite and unenforcible — res judicata — judgment against plaintiff on counterclaim in former action by defendant res judicata.**

An option clause in a contract for the sale of cloth providing that the plaintiff "should have the privilege to purchase so much more of the aforesaid merchandise as the defendant would be able to procure" is unenforcible, since it is indefinite and uncertain as to the quantity of goods plaintiff is entitled to buy under the exercise of its privilege, and is uncertain as to the limit of time during which the privilege is to be exercised, and no price is stated at which the plaintiff is entitled to exercise its option.

The delivery of sixteen pieces of cloth under the option clause did not have the effect of curing the defects of uncertainty and indefiniteness.

In an action by the present defendant against the plaintiff herein to recover for goods sold under the contract the defendant interposed as a defense and counterclaim the same allegations as alleged in the complaint in this action, including an allegation of damages resulting from the failure on the part of the defendant to comply with the option clause. *Held*, that the judgment in that action is *res judicata* as to the issues in the present action; the allegations in the complaint in this action as to the delivery of sixteen pieces of cloth under the option clause did not have the effect of creating a liability against the defendant which did not exist before the option was exercised.

APPEAL by the defendant, M. Lurie Woolen Co., Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of February, 1921, denying defendant's motion for judgment on the pleadings consisting of a complaint, an answer and a reply.

*Samuel J. Rawak* of counsel [*A. S. Marcuson*, attorney], for the appellant.

*Jacob R. Schiff* of counsel [*J. M. Cohen* with him on the brief; *Morrison & Schiff*, attorneys], for the respondent.

GREENBAUM, J.:

The complaint alleges the making of a contract in writing on April 10, 1919, for the sale to the plaintiff of 200 pieces of cloth known as tricotine at certain prices, which contained a provision that the plaintiff "should have the privilege to purchase so much more of the aforesaid merchandise as the defendant would be able to procure;" that the 200 pieces were delivered and paid for; that plaintiff exercised the privilege or option of purchasing more of said cloth; that defendant ratified and confirmed the option by delivering 16 additional pieces of cloth on June 10, 1919, informing the plaintiff that that was all of the said cloth it had procured although in fact defendant did procure 500 pieces of said cloth which it failed to sell to plaintiff, notwithstanding its exercise of the privilege to buy them.

Defendant in its answer pleads a general denial, the Statute of Frauds (Pers. Prop. Law, § 85, as added by Laws of 1911, chap. 571) and a former adjudication. The portion of the

defendant's answer which relates to the bar of the former adjudication alleges the making of the contract described in the complaint; that plaintiff upon the delivery of the 200 pieces of cloth therein mentioned paid therefor by giving the defendant its promissory notes aggregating \$30,869.29; that thereafter three separate actions upon these notes were instituted by defendant against plaintiff in the Supreme Court which were subsequently consolidated into one action; that plaintiff (as defendant in that action) interposed an answer setting up as a "defense" and "counterclaim" the same allegations as those set forth in the complaint in this action including an allegation of damages in the sum of \$50,000 resulting from the failure on the part of the defendant (plaintiff in that action) to deliver the 500 pieces although it was able to deliver them.

The only difference between the allegations in the present complaint and those pleaded in the defense and counterclaim in the former action is that the latter contained no allegations as to the delivery of the 16 additional pieces of cloth under the alleged privilege clause of the contract which is set up in the complaint in this action.

It may be incidentally observed that although plaintiff alleges in its complaint that the price of the 200 pieces of cloth described in the agreement was fixed at three dollars and two and one-half cents per yard, there is no allegation therein as to the price paid for the 16 additional pieces.

It was held by the learned Special Term justice that the allegation as to the delivery of the sixteen pieces of cloth appearing in the complaint under review created a radically different issue from that presented in the defense and counterclaim in the other action. It seems to us that the additional allegation in the complaint did not have the effect of creating a liability against the defendant which did not exist before the option was exercised.

The privilege clause under consideration is indefinite and uncertain. It fails to state what quantity of goods plaintiff is entitled to buy under the exercise of its privilege. It does not appear whether the option is limited to as many pieces of the goods as defendant might be able to procure, or only to as many as plaintiff cares to avail itself of. It is uncertain

as to the limit of time during which the privilege is to be exercised. Is the privilege to continue for a week, a month, a year, or a lifetime? May it be exercised only once, or as often as plaintiff wishes? It is also silent as to the price at which plaintiff is entitled to exercise its option.

It follows, if we are correct in our interpretation of the privilege clause in question, that it was not an enforceable agreement and that the delivery of the additional sixteen pieces of cloth could not possibly have the effect of curing the defects of uncertainty and indefiniteness pointed out.

It also follows that the former adjudication was necessarily determinative of the rights of the parties under the privilege clause referred to and was a conclusive bar to the maintenance of this action. In any event the complaint does not set forth a cause of action and defendant's motion for judgment upon the pleadings should have been granted.

The order appealed from is reversed, with ten dollars costs and disbursements, and the motion for judgment on the pleadings is granted, with ten dollars costs.

DOWLING, LAUGHLIN, SMITH and MERRELL, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

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HATTIE HUNT, Respondent, v. MARY JANE WICKHAM and Others, Appellants.

Second Department, July 22, 1921.

**Wills—bequest to daughter for life and then to "child or children"—remainders vested on death of life tenant—sole surviving child of life tenant takes estate on death of life tenant—grandchildren do not share.**

Under a will devising property to the testator's daughter, "All to be subject to her exclusive management and control for and during the period of her natural life and then to her child or children, or, if she leaves no child or children, that the property is to be divided equally" between others, the remainders vested only upon the death of the life tenant, and, therefore,

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the sole surviving child of the life tenant takes the estate on the death of the life tenant and nothing passed to the other children of the life tenant who were living at the time of the death of the testator but who died before the life tenant, and so nothing passes to children of the deceased children of the life tenant.

BLACKMAR, P. J., dissents, with memorandum.

APPEAL by the defendants, Mary Jane Wickham and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Orange on the 2d day of December, 1920, upon the decision of the court rendered after a trial at the Orange Special Term.

This action was to obtain a construction of the following paragraph of the will of Joseph M. Elston, deceased, of Minisink, Orange county:

"*Third.* I give and bequeath to my daughter, Mary Jane, wife of Abraham Wickham, the farm on which she now resides lying partly in the Township of Minisink and partly in the Township of Greenville, County and State aforesaid, with the appurtenances thereunto belonging and the rents, issues and profits thereof. All to be subject to her exclusive management and control for and during the period of her natural life and then to her child or children, or, if she leaves no child or children, then the property to be divided equally between the heirs of Jesse Elston, my son, and Lewis A. Elston, grandson, whose names are in this Will."

The court decreed plaintiff to be entitled to the sole ownership of the property.

*Edward P. Jones* [*Samuel M. Cuddeback* with him on the brief], for the appellants.

*William A. Feuchs* [*Frank Lybolt* with him on the brief], for the respondent.

PUTNAM, J.:

Here was a life estate with active control in Mrs. Wickham, "and then to her child or children," with a gift in substitution "if she leaves no child or children." The children's names are not given.

The testator died April, 1877, leaving Mary J. Wickham, the life tenant, and her brother, Jesse Elston. Mary J.

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Wickham then had six children, including Hattie Hunt, this plaintiff, and a son, William E. Wickham, husband of Mary Jane Wickham, and father of defendants Emma Ford and Charles L. Wickham. Her other four children survived the testator but died in infancy.

Abraham Wickham, the son-in-law of the testator, died in February, 1894.

The life tenant's son, William E. Wickham, died November 15, 1916 (predeceasing his mother, the life tenant), leaving a will which purported to give his residuary estate to his wife and children (the defendants above named) in equal shares.

Mary J. Wickham, the life tenant, died April 23, 1919, leaving her daughter Hattie Hunt, plaintiff, and her grandchildren, Emma Ford and Charles L. Wickham, and the defendant Mary Jane Wickham.

The primary question is whether William E. Wickham had a vested remainder in one-half of this property, which he could devise by will. Or, in other words, did the remainders to Mary Wickham's "child or children" become vested in them on the death of the testator? If so, were such remainders to the "child or children" of Mary J. Wickham subject to be divested by their death or deaths before that of the life tenant?

According to appellants' contention, these interests immediately vested in the infant grandchildren of the testator. There is neither a clause of survivorship among the children, nor a limitation to such as shall attain the age of twenty-one. Hence on appellants' theory, when these four infants respectively died, their interests passed to their mother, for her life, with a reversion to the surviving brother and sister. (1 R. S. 752, § 6; Real Prop. Law [Gen. Laws, chap. 46; Laws of 1896, chap. 547], § 285; Decedent Estate Law [Consol. Laws, chap. 13; Laws of 1909, chap. 18], § 85.) Such a vesting of these fractional interests of the minor children cannot be deemed the testator's intent. (*Hedges v. Harpur*, 3 De Gex & Jones, 129, 142.)

On the other hand, the provision as to leaving children is held not only to call for the birth of such children, but requires that they should outlive the life tenant. Hence such as die before the life tenant's death have no descendible or devisable interest. (*Thicknesse v. Liege*, 3 Brown Parl. Cas.

365; Fearn's Posthumous Works, 250, 253; *Purdy v. Hayt*, 92 N. Y. 446.) The further contention that the words "child or children" may be read to include grandchildren, is refuted by a long line of authorities. (*Matter of Pulis*, 220 N. Y. 196.)

The will must, therefore, be construed to give this estate to plaintiff, as only surviving child of the life tenant, as such interests vested only upon the death of Mary Jane Wickham, so that plaintiff is now entitled to the sole and exclusive ownership thereof.

The judgment should, therefore, be affirmed, with costs of this appeal payable out of the estate.

RICH, KELLY and JAYCOX, JJ., concur; BLACKMAR, P. J., reads for reversal.

BLACKMAR, P. J. (dissenting):

The more I study the words of this will, without being confused by matter which has been written with respect to wills of different wording and different import, the more it seems to me that it is not consistent with the will of the testator that the children of her grandson, William Edgar, should be excluded from participation in the estate.

Reducing the 3d clause of the will to the plainest terms, it reads as follows: "I give to my daughter, Mary Jane, the farm on which she now lives for and during the period of her natural life, and then to her child or children." If we stop right here, we find a vested remainder in the child or children of the life beneficiary. And I find nothing else in the will to deprive them of this vested right. The will then proceeds: "or, if she leaves no child or children, then the property to be divided equally between the heirs of Jesse Elston, my son, and Lewis A. Elston, grandson." But this contingency has never happened, and, therefore, the gift over never took effect. I think the true construction of the will is that there is a vested remainder in the child or children of Mary Jane, subject to be divested in the event that she leaves no child or children; but as this contingency never happened, the remainder was never divested.

Judgment affirmed, with costs to all parties who have appeared payable out of the estate.

HENRY SPIELVOGEL, Respondent, v. RICHARD F. VEIT and  
EMMA A. VEIT, Appellants.

Second Department, July 22, 1921.

**Vendor and purchaser — memorandum signed by parties construed as agreement by vendor to sell — doctrine that provision in writing overrides that in printing applied — memorandum agreement may be enforceable though parties contemplate formal contract — memorandum not complete contract, which may be specifically enforced, where duration of mortgage and rate of interest not specified.**

A memorandum agreement signed by all the parties may be construed as an agreement on the part of the vendor to sell the real property described therein where the price stated is called the "price agreed on," though there is no express agreement on the part of the vendor to sell.

The inconsistency in the provisions regarding mortgages may be solved by the doctrine that the provision in writing overrides that in printing.

The fact that the memorandum agreement provided that a contract was to be executed in duplicate, when a further payment was to be made, is evidence that the writing was not intended to be a complete contract, but it is not conclusive, for if the writing contained all the essential terms of a complete contract, it is enforceable although the parties contemplated a more formal instrument.

The memorandum agreement, however, was not a complete contract which may be specifically enforced, since there was no time fixed for the duration of the first mortgage provided for in the agreement and no rate of interest was prescribed, and this together with the fact that the parties agreed that a contract should thereafter be executed leads to the conclusion that the instrument in question was merely a record of the agreement so far as reached, leaving substantial matters to be settled in the formal contract.

APPEAL by the defendants, Richard F. Veit and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 5th day of November, 1920, upon the decision of the court rendered after a trial at the Kings Special Term.

*William C. Beecher* [*Justus W. Smith* with him on the brief], for the appellants.

*Matthew Feldman*, for the respondent.

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Second Department, July, 1921.

**BLACKMAR, P. J.:**

The complaint alleges a contract in writing for the sale of land. The plaintiff vendee introduced in evidence the following writing, signed by all the parties:

‘ MEMORANDUM AGREEMENT

I hereby agree to purchase House and Lot at  
No. 1537 Nostrand Ave.  
Borough of Brooklyn  
County of Kings  
at price agreed on, \$10500.  
\$250 upon the signing of this memorandum, the receipt  
whereof is hereby acknowledged, and a further  
\$750 upon the delivery of a contract duly executed,  
which contract is to be executed in duplicate by  
me on or before Apr. 7th, 1920  
and I agree to pay \$3500.  
upon delivery a full covenant deed, conveying  
property subject to mortgages now a lien, Apr. 30, 1920  
1st mortgage of \$6000  
2nd       “       \$. . . . .  
Purchase money of \$. . . . .  
all monies accepted are subject to the approval of  
the owner, referring both to price and terms.  
Dated 6 day of Apr. 1920.  
Henry Spielvogel, Purchaser  
Richard F. Veit  
Emma A. Veit       Address  
Altman & Seyman       Agent  
“ALTMAN & SEYMAN  
“Real Estate  
“6 Snyder Ave., Brooklyn, N. Y.”

The plaintiff gave defendants a check for \$250, which has not been cashed. On the following day the parties met and plaintiff produced a formal contract. It differed in material respects from the writing just quoted. It is enough to point out that by it the seller was required to pay taxes for the first half of 1920, that “all personal property appurtenant to or used in the operation of said premises is represented to be owned by the seller and is included in this sale, and in

particular the carpets, chandeliers, gas stoves and gas ranges, awnings, etc.," and that any assessments payable in future installments should be deemed to be due and payable by the seller. The defendants refused to sign. Subsequently, the vendee sued for specific performance and had judgment.

The only question on this appeal is whether the writing above quoted was intended to be a final complete contract. In solving this the writing must be analyzed in the light of the existing circumstances. It is to be borne in mind that the complaint declares on a contract in writing, and evidence of conversations at or before the time of signing the paper is incompetent to change it or enlarge its terms.

There is no expressed agreement on the part of the vendor to sell, but the writing is entitled "Memorandum Agreement," the price, \$10,500, is called the "price agreed on," and the document is signed by all the parties. It may, therefore, be treated as an agreement on the part of the vendor to sell. (*Tobias v. Lynch*, 192 App. Div. 54.)

There is an inconsistency in the provisions regarding the mortgages. It is stated that the premises are to be conveyed "subject to mortgages now a lien." Then follows: "1st mortgage of \$6,000." As matter of fact the only mortgage then a lien was one for \$2,750. Given their literal meaning these provisions are conflicting, for the amount of cash to be paid, i. e., \$4,500, added to the \$6,000 mortgage, makes up the purchase price. This difficulty may be solved by the doctrine that the provision in writing overrides that in printing (*Chadsey v. Guion*, 97 N. Y. 333), and the words "subject to mortgages now a lien" are part of the printed form, whereas the written figures, "\$6,000" follow the printed words "1st mortgage of \$...." The intent might be read into the writing that the seller agreed to take steps to sell subject either to a first mortgage of \$6,000 obtained by him from another, or a purchase-money mortgage taken back. The provision "all monies accepted are subject to the approval of the owner, referring both to price and terms" was obviously inserted in a form drawn up by a broker to aid him in bringing the parties together by taking a part payment from the purchaser subject to the vendor's approval. The signature of the vendor sufficiently approves it in this case.

This writing provides that a contract is to be executed in duplicate, when a further payment is to be made. This is evidence that the writing was not intended to be a complete contract (*Brown v. New York Central R. R. Co.*, 44 N. Y. 79), but it is not conclusive, for if the writing contains all the substantial terms of a complete contract, it is none the less one and may be enforced although the parties contemplated a more formal instrument. (*Sanders v. P. B. F. Co.*, 144 N. Y. 209.)

In the writing we find lacking two terms, which would usually be considered essential to a complete contract. There is no time fixed for the duration of the first mortgage of \$6,000 and no rate of interest prescribed. Of course, the parties may make a contract without expressing these terms, and it may be specifically enforced, for the legal rate of interest may be assumed and the mortgage may be due on demand. (*Bennett v. Austin*, 9 Wkly. Dig. 88.) This was decided by the Court of Appeals, but I do not find it in the regular reports. (*Jones Mort.* [6th ed.] § 75.) But in this case, where the writing, as pointed out above, can have no construction under the existing circumstances but as an agreement to place a new mortgage on the premises, it would be absurd to assume that the parties intended the idle formality of a new mortgage immediately due. The fact that they agreed that a contract should thereafter be executed, forces the conclusion that the duration of the mortgage and the rate of interest were left to be settled on the execution of the formal contract. The writing, therefore, is not a complete contract which may be enforced specifically, but a record of the agreement so far as reached, leaving substantial matters to be settled in the formal contract.

The judgment should be reversed, and as the complaint alleged a contract in writing and the writing proved was not a contract, the complaint should be dismissed, with costs.

RICH, KELLY, JAYCOX and MANNING, JJ., concur.

Judgment reversed and complaint unanimously dismissed, with costs.

EVELYN I. SKINNELL, as Executrix, etc., of DANIEL A. SKINNELL, Deceased, Appellant, v. EDWARD MAHONEY and DANIEL F. COHALAN, as Executors, etc., of DANIEL A. SKINNELL, Deceased, and Others, Respondents, Impleaded with SKINNELL SILVER PLATING Co., INC., and Others, Defendants.

Second Department, July 22, 1921.

**Trusts — purchase of trust property by corporation organized by trustees for that purpose — payment of purchase price from proceeds of business — stock issued to trustees and beneficiaries individually must be returned to estate — consent of beneficiaries did not validate transaction — participation in transaction by executor not ground for removal — issue of shares to third person for services as manager not illegal.**

Where two of the trustees under a will, one of whom was a beneficiary, and another beneficiary, by means of a corporation organized for the purpose and owned and controlled by them, purchased a business which had been carried on by the testator and devised by him as part of the trust estate, and the purchase price fixed by them was paid from the proceeds of said business, capital stock issued to them must be returned to the estate, since said shares represent profits made by the trustees in their dealings with the trust property.

The consent of the beneficiaries under the trust did not validate the transaction since their interest was that of beneficiary under an inalienable trust, and there was a contingent remainder over to their issue in case of the death of the beneficiaries before reaching the age of forty-five.

There is no sufficient reason for removing the executor who participated in the organization of the corporation and the issue of the stock.

The issuance of shares of stock to the manager of the corporation in payment for services was not illegal and he should be permitted to retain said shares.

APPEAL by the plaintiff, Evelyn I. Skinnell, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Queens on the 16th day of February, 1921, upon the decision of the court rendered after a trial at the Queens Special Term dismissing the complaint upon the merits.

*Frank Gallagher* [*Howard A. Sperry* with him on the brief], for the appellant.

*Joseph A. Byrne*, for the respondents Mahoney and Leary.

*John F. Couch*, for the respondent Cohalan.

BLACKMAR, P. J.:

The plaintiff and defendant Mahoney, two of the trustees under the will of Daniel A. Skinnell, deceased, and defendant Skinnell, by means of a corporation organized for the purpose and owned and controlled by them, purchased a business which had been carried on by decedent. The purchase price fixed by them was paid from the proceeds of the business so purchased, and the capital stock of the company, except a small amount allotted to defendant Morley as manager, and one-fifth thereof left unissued, was divided among the said two trustees and defendant Skinnell, each receiving twenty-five shares. These shares of stock represent the profits made in their dealings with the trust property. The said two trustees have violated the cardinal rule of law that trustees may not deal with trust property to their own advantage, and that if they do they are accountable therefor to the estate. In this respect there is no difference in the situation of the plaintiff and the defendant Mahoney. They have alike violated this rule of law and are accountable to the estate for the shares of stock that they have issued to themselves. The defendant Skinnell, acting jointly with them, is subject to the same disability. The motive of the trustees is a matter of indifference. They may have been moved by the most laudable motives. They may have devised the plan of selling the business to a corporation organized for the purpose of purchasing it, as the best method of preserving it. The appraisal of the property may have been, as I think it was, honestly and fairly made, and yet they were disqualified, by an inflexible rule, from dealing with the trust property to their own profit. The consent of the plaintiff and defendant Skinnell did not validate the transaction. They did not own the estate. Their interest was that of *cestui que trust* under an inalienable trust, and there was a contingent remainder to their issue in case of death before reaching the age of forty-five.

The shares of stock issued to the plaintiff and to defendants



Skinnell and Mahoney should be transferred to the executors and trustees of the estate. There is no sufficient reason for removing the defendant Mahoney, and the defendant Morley, who is not a trustee and received the stock in connection with his services as manager, should be permitted to retain the five shares issued to him.

Judgment accordingly, with costs to the plaintiff in this court and in the court below, payable from the estate.

RICH, PUTNAM, KELLY and JAYCOX, JJ., concur.

Judgment reversed and judgment directed that plaintiff and defendants Mahoney and Skinnell transfer each twenty-five shares of stock of the corporation to the executors and trustees under the will of Daniel A. Skinnell, deceased, with costs to the plaintiff in this court and in the court below, payable from the estate.

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Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of ESTELLA SCHAPIRO, Respondent, for Compensation under the Workmen's Compensation Law, v. JOHN WANAMAKER, Employer, and GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., Insurance Carrier, Appellants.

Third Department, July 7, 1921.

**Workmen's Compensation Law — employee of department store injured while pulling out drawer — evidence not justifying award — cancer not due to injury received.**

An award was not justified where it appeared that the claimant, a woman thirty-two years of age, who was employed as assistant buyer in a department store, while pulling out a large drawer, felt something snap in her chest and fell fainting, the drawer falling on her chest; that she continued to work in the store for more than seven months thereafter when she was operated on for cancer in the breast but later returned to her work at which she continued till she resigned because of a disagreement with her superior, and there was no evidence that the claimant was not perfectly able at the time of her resignation or at any time up to the close of the period of non-employment, which she voluntarily

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terminated by accepting other employment, to perform the services required of her.

Furthermore, the evidence does not establish that the cancerous condition of the claimant was brought about by any injury received by her in the course of her employment.

JOHN M. KELLOGG, P. J., dissents.

APPEAL by the defendants, John Wanamaker and another, from an award of the State Industrial Commission, entered in the office of said Commission on the 20th day of October, 1920.

*Alfred W. Meldon* [*Joseph Force Crater* of counsel], for the appellants.

*Charles D. Newton*, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

Starting from the standpoint that an "injury" or a "personal injury" means, within the contemplation of the Workmen's Compensation Law, "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom" (§ 3, subd. 7, as amd. by Laws of 1917, chap. 705), where shall we find the evidence to support the present award? The claimant is a woman thirty-two years of age. On the 13th day of November, 1918, she was employed as an assistant buyer by John Wanamaker, receiving a compensation of twenty-nine dollars per week. While pulling out a large drawer, in the work of cleaning up her department, the claimant testifies that she felt something snap in her chest and fell fainting. It appears that in falling the drawer fell upon her chest. The store physician bandaged her chest and the claimant went to her home, where she remained for three days, returning afterwards to the store. During this three days claimant subjected herself to an X-ray examination, with negative result. Her chest remained bandaged for some time, but she continued her work in the store, so far as the record discloses, until the 25th of June, 1919, when, discovering a rash upon her breast, she consulted physicians and was sent to St. Luke's Hospital for an immediate operation for cancer. The operation was performed

on the 3d day of July, 1919, the claimant remaining in the hospital for three weeks, when she went to the country. The operation appears to have been successful for the time being at least, and on the 16th day of September, 1919, the claimant returned to the Wanamaker store, where she worked until the 10th day of April, 1920, when she resigned because of a disagreement with the buyer, and it appears from the evidence that she declined to consider re-employment at the same place. From the sixteenth day of September to the tenth of April following the claimant's employment was less arduous than previously, but she was paid the same wages, and it is undisputed that she might have continued the employment indefinitely upon the same terms, except for the fact that she could not tolerate the conduct of Miss Bader, the buyer, to whom she acted as assistant, though from the record Miss Bader appears to have done nothing more than to fail to evince as much curiosity as to the feelings of the claimant as the latter expected. The Commission has awarded compensation from the date of the resignation of the claimant, April 9, 1920, to October 4, 1920, on which latter date the claimant accepted employment with another concern at a substantial advance over that which she had been receiving at Wanamaker's. The defendants appeal.

There is no evidence in the record that the claimant was not perfectly able to perform the services required of her at Wanamaker's at the time of her resignation, or at any time up to the close of the period of non-employment; her rather petulant declarations that she could not work under the conditions — which involved the mere personal friction between the claimant and Miss Bader — not arising to the dignity of evidence. (*Matter of Jordan v. Decorative Co.*, 230 N. Y. 522, 527; *Matter of Case*, 214 id. 199.) In the case of *Matter of Jordan v. Decorative Co.* (*supra*) the court say: "Work was offered and refused. Earning capacity was then equal, if the claimant was willing to exert it, to capacity before the injury. We must hold him to the use of the powers which he had. \* \* \* The statute was not adopted that sloth might be a source of profit." The Workmen's Compensation Law does not assume the obligation of adjusting the personal relations of employees; it does not assume to charge to industry

the losses incident to the caprice of those who refuse to perform the services for which they are not incapacitated by injuries growing out of the employment, and it seems to us entirely clear that there is no legal foundation for this award, assuming the cancerous condition to have been due to the accident.

But is there evidence to show that the cancer was the natural and unavoidable result of the accident happening to the claimant on the 13th day of November, 1918? The claimant was out of the store for three days, in the meantime submitting to an X-ray examination showing a negative result, and then she resumed her employment and remained at work until the twenty-fifth of the following June, some seven months later, at which time she underwent an operation said to have shown a cancerous condition of her left breast. The only evidence bearing upon the relation of this disease to the accident is afforded by Dr. Michailovsky, a distant relative of the claimant, who says he was visited professionally by the claimant at the time of the accident; that he sent her for an X-ray examination, and that he did not see her again until the following June, when she consulted him because of a rash upon her breast. He says he does not know the cause of this rash; that while examining her he discovered a condition which induced him to send her to a hospital for immediate operation for a cancer.

This doctor was asked if he connected this condition up with the visit which the claimant made to him in November previous, and he answered in the affirmative. Asked how he made this connection he replied that he had been studying the etiology of cancer for some time and was very much interested in the causation of cancer. He then stated that he had been making this study from 1908 to the present time, and that he had not found out the cause of cancer. Further asked: "Why did you connect up this condition with the visit Miss Schapiro made in November?" he replied: "Because there is a certain amount of evidence that cancer may follow an injury;" but he admitted that it does not necessarily follow an injury. Asked what kind of an injury would it have to be to cause the condition, he answered, "I do not know." Asked if it would have to be a direct trauma

to the affected part, he again answered, "I do not know. Nobody knows."

After some further incidental matters, not bearing upon the point here under consideration, the deputy commissioner took the witness in hand. The deputy commissioner asked: "Is it not commonly known among physicians that cancer follows a blow?" The doctor answered: "We think that a chronic injury is more apt to cause cancer than a single injury, but a single injury frequently enough has been followed by cancer to make it possible it can do so in any case." The deputy commissioner persisted: "It is common knowledge to all men, where a woman has received a blow or hit in the breast, cancer follows?" To this the physician answered: "We have to take evidence. It is not sure. I have not seen cases in the Memorial Hospital [where he had his experience] where cancer followed a definite single injury." To the deputy commissioner's suggestion that "medicine is so uncertain" the witness replied: "We cannot be absolutely sure."

Surely this falls far short of evidence that the cancerous condition of this claimant, brought to light seven months after her injury, was such a "disease or infection as may naturally and unavoidably result" from the accident which befell the claimant. The claimant's own private physician says he does not know what kind of an injury would be necessary to produce the condition subsequently found; that he does not know whether a direct trauma would be necessary, and that no one knows. All that he pretends to know is that "there is a certain amount of evidence that cancer may follow an injury," and that "a single injury frequently enough has been followed by cancer to make it possible it can do so in any case." The claimant's injury which caused her to faint and fall was described as something snapping in her chest, not a blow to her chest, and while there is some testimony that she was found under the large drawer, that it lay upon her breast when she came to, there is very little to indicate that the drawer itself produced any traumatism of consequence. The claimant testifies to great pain, and evidently has reference to the injury resulting from her strain in pulling on the drawer at the time she felt the snapping, not to the incidental fact of the drawer being upon her when

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she came to; and we are unable to discover any evidence upon which a finding can legitimately be based that the cancer was a result naturally and unavoidably flowing from the injury received. The whole matter is speculative. Medical science, as voiced by the claimant's own witness, frankly says that it has not yet found out the cause of cancer; but the State Industrial Commission finds that the claimant's cancerous condition was produced by an injury, the exact nature of which is not disclosed by the evidence, and which no one pretends to know would be capable of producing the result outside of the Commission itself.

The award should be reversed and the claim dismissed.

All concur, KILEY, J., in result, except JOHN M. KELLOGG, P. J., dissenting.

Award reversed and claim dismissed.

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Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of PHILIP CONLEY, Respondent, for Compensation under the Workmen's Compensation Law, v. THE UPSON COMPANY, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.

Third Department, July 7, 1921.

**Workmen's Compensation Law — injury to eye — when failure to give notice of injury as required by § 18 prejudicial — evidence insufficient to establish that permanent loss of eyesight resulted from injury.**

The claimant in May, 1918, while at work on a pressing machine, received an injury to his eye by some shavings being thrown into it. He was sent to his employer's first aid room and received treatment and thereafter continued his work without giving notice of any serious trouble with his eye although he told the foreman the day following the accident that his eye was inflamed and sore. The eye became gradually worse and he lost the sight thereof in January, 1919, but did not call a physician until nearly a year after the accident.

*Held*, that the claim should have been dismissed, *first*, because the failure of the claimant to give notice of the injury as required by section 18 of

the Workmen's Compensation Law was prejudicial to the employer and the insurance carrier, and *second*, because there was no medical testimony tending to show that the permanent loss of eyesight could have resulted naturally and unavoidably from the injury.

JOHN M. KELLOGG, P. J., and KILEY, J., dissent.

APPEAL by the defendants, The Upson Company and another, from an award of the State Industrial Commission, entered in the office of said Commission on the 31st day of December, 1920.

*Benjamin C. Loder* [*E. C. Sherwood* and *William B. Davis* of counsel], for the appellants.

*Charles D. Newton*, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

The claimant, sometime in the month of May, 1918, while at work upon a pressing machine, had some shavings thrown into his left eye. These shavings were paper shavings, constituting a part of the materials, apparently, used in making beaver boards. The claimant was sent to the first-aid room maintained by the employer, where the eye was washed out with boracic acid, and he returned to his work, finished the day's employment, and continued for sometime thereafter, so far as the record shows making no complaint and giving no notice of any serious trouble with his eye. He told the foreman, the day following the accident, that it was inflamed and sore, but he continued to work, and did not indicate that it was anything of importance. He says that the next month after the accident he began to get hazy in his eyesight; that afterward it became worse, and in the month of January, 1919, eight months after the accident, the sight was completely gone. He had never consulted a physician, or asked the employer to furnish a physician, until after the eye had fully lost its sight, according to his own testimony. He says that he consulted a lawyer in January, but it was not until April, practically a full year after the accident, that he called a physician; so that this claimant, knowing that his eye was growing worse from month to month, is in the position of not having given the notice required by section 18 of the Work-

men's Compensation Law under conditions which were daily increasing the risks of the employer, if compensation was to be paid. Giving the claimant the benefit of a technical construction of the act, that the notice was not required until "within ten days after disability," because under section 18 of the act (as amd. by Laws of 1918, chap. 634), taking effect on May 13, 1918, the notice was required "within thirty days after the accident causing such injury," he says that this eye had totally lost its sight in January, 1919, and certainly he was called upon to give the notice at that time, if he was to come within the plain letter of the law. But if the employer and the insurance carrier were not to be prejudiced by the alleged serious consequences of this apparently trifling accident they were entitled to notice as soon as it became evident that the eye was growing worse; they had a right to have the claimant treated for the injury at a time when treatment was calculated to be of use in preventing further injury. Such notice as was given by the washing out of the eye at the first-aid station on the occasion of the accident was not notice that this eye was likely to become wholly useless within a period of eight months. It was notice of a trifling injury, such as the first-aid station was designed to provide for — nothing more, and the fact that the claimant went back to his work, continuing the same for a considerable period, making no complaint, justified the employer in concluding that the first aid had fulfilled its legitimate purpose and that there was no occasion for further action. The claimant alone knew of the serious difficulty, if it existed; good faith demanded that he should give notice at a time when notice would be of use; and the finding of the State Industrial Commission that the employer was not prejudiced by the failure to give the notice which the statute requires, because of the alleged knowledge of the employer and the furnishing of medical aid, is without support in the evidence. The only notice of an accident which came to the employer was such as to fully warrant the assumption that the injury was purely incidental and of no permanent effect, and the conceded conduct of the claimant was calculated to aid in this conclusion. His claim that he was afraid of losing his employment is not an excuse



for failure to give notice of a condition which is imposing a burden upon others.

There is no medical testimony in this case tending to show that the permanent loss of eyesight could have resulted naturally and unavoidably from this trifling injury. (See Workmen's Compensation Law, § 3, subd. 7, as amd. by Laws of 1917, chap. 705.) Indeed, there is no testimony in the case which excludes the theory that the loss of sight was not due to an entirely independent cause.

But if we assume that there is evidence upon which the award might have been based, in the first instance, there is a conclusive determination that the lack of notice was fatal to the claimant's right to compensation, and unless an inferior judicial tribunal may review its own determinations of law and fact the award now before us may not stand. Deputy Commissioner Lang held a hearing upon this same claim on the 15th day of October, 1919, handing down the following memorandum: "No date of accident fixed. No notice of accident to employer in accordance with provision of law. Claim for compensation denied. Case dismissed. If claimant, at any future time, shall be able to establish that there was notice given, case may be re-opened on his presentation of the fact. Case closed."

The claimant has not shown that there was a notice in accordance with the provisions of law. He has shown that there was some knowledge on the part of fellow-employees, who may have communicated the fact to the employer, that the claimant had suffered from paper shavings in his eye; that he had been given first aid, and resumed his work, making no further complaint for a period of several months, during which time, he now claims, he was growing progressively blind. It is to be noted that no award was made; the claim was denied; and we know of no provision of law by which a claim which has been denied upon a hearing can be reopened, except by an appeal in the manner provided by the statute.

Section 20 of the Workmen's Compensation Law (as amd. by Laws of 1919, chap. 629) provides the time and method of procuring a hearing upon claims, and that "within thirty days after a claim for compensation is submitted under this section, or such hearing closed, *shall make or deny* an award, determining

such claim for compensation, and file the same in the office of the Commission. Immediately after such filing the Commission shall send to the parties a copy of the decision. \* \* \*

The decision of the Commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law." All this has been complied with; the Commission gave notice of its decision to the parties, holding that the lack of notice was fatal to the making of an award, and section 23 (as amd. by Laws of 1917, chap. 705) provides that "an award or decision of the Commission shall be final and conclusive upon all questions within its jurisdiction, as against the State Fund or between the parties, unless reversed or modified on appeal therefrom as hereinafter provided." There was never any appeal from the decision of the deputy commissioner, approved by the Commission in sending out notice of the disposition of the case, but the Commission, upon the suggestion of counsel to the Commission, has assumed to reverse its former decision and to reopen the case, contrary to the established jurisprudence of this State. (*Stephens v. Santee*, 49 N. Y. 35, 39; *People ex rel. Chase v. Wemple*, 144 id. 478, 482; *United States v. Burchard*, 125 U. S. 176; *People ex rel. Cohen v. York*, 43 App. Div. 138; *Matter of Hyland v. Waldo*, 158 id. 654, 658; *Matter of Equitable Trust Co. v. Hamilton*, 226 N. Y. 241, 245.) In *People ex rel. Chase v. Wemple* (*supra*) the court say: "It is the general rule that officers of special and limited jurisdiction cannot sit in review of their own orders or vacate or annul them. A justice of the peace cannot set aside or alter a judgment after he has entered it. (*Stephens v. Santee*, 49 N. Y. 39.) The nearest approach to an exception is in the case of an audit by a board of supervisors to which the learned counsel for the appellant calls our attention. (*People ex rel. Hotchkiss v. Supervisors*, 65 N. Y. 225.) That case explicitly concedes the general rule, and then goes upon the ground that the boards of supervisors are a local legislature and exercise quasi judicial powers only in a qualified sense. I know of no other exception, and do not think we can graft upon the special and limited powers of the Comptroller when acting judicially the general powers which belong to courts of original jurisdiction." (See *Matter of Equitable Trust Co. v. Hamilton*, *supra*, where the court,

at page 245, say, in reviewing the audit of a board of supervisors, "we do not impair the efficacy of the principle that quasi-judicial action, when the statute intends it to be final, may not thereafter be revoked," citing *People ex rel. Chase v. Wemple, supra.*)

It is true that where an award is made the Commission is authorized, upon its own motion or upon the application of any party in interest, *on the ground of a change in conditions*, at any time to review any award, and, on such review, *may make an award ending, diminishing or increasing the compensation previously awarded* (Workmen's Compensation Law, § 22), but this is confined to an award previously made; and the statute in the very next section makes a clear distinction between an award and a decision, and the same distinction runs through section 20 of the act. "The power of the commissioners respecting the dismissal and reinstatement of police officers," say the court in *People ex rel. Cohen v. York (supra)*, "is one conferred by law; trials are regulated by law and the rules of the department. \* \* \* There was no duty or obligation upon the police board to open the relator's case and grant him a rehearing. No right to such a rehearing was given him by law." The same principle applies in the case now under consideration. There was a decision of the Commission, subject to appeal on questions of law, and the claimant neglected to procure a review of the determination in the manner pointed out by the statute, and he has no right to a rehearing. If there had been an award he would have been entitled to a rehearing only upon the ground of a change in conditions (§ 22) and no facts appear in this case to show any change in the conditions existing at the time of the hearing here under review from those prevailing upon the original hearing.

Section 74 of the act, providing that "the power and jurisdiction of the Commission over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just," cannot be construed to overrule the positive provisions of the act. A case is, of course, a claim of which the Commission has primary jurisdiction. When, by its decision, it determines

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that there is no case then it is without jurisdiction. As it is not called upon to make findings upon which an award is denied, so there is no authority for reviewing such denial, except by an appeal in the manner prescribed by section 23. It is the "findings or orders relating thereto" which the Commission is authorized to modify or change (§ 74), and not the determination of the Commission making or denying an award, for this is declared to be "final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law," and the Court of Appeals has "always given literal effect to the words 'final and conclusive,' and has sought to promote the policy upon which the statute is founded." (*Matter of Southern Boulevard R. R. Co.*, 143 N. Y. 253, 259; *People ex rel. Crane v. Hahlo*, 228 id. 309, 317.)

The award should be reversed and the claim dismissed.

COCHRANE and VAN KIRK, JJ., concur in the result on the grounds that no causal relation is shown between the accident and the injury, and that the Commission could not properly find that the appellants were not prejudiced by the lack of written notice because of the reasons assigned by it for so finding; JOHN M. KELLOGG, P. J., and KILEY, J., dissent and vote for affirmance.

Award reversed and claim dismissed.

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BROOKS T. LA ROSE, by FREDERICK J. LA ROSE, His Guardian ad Litem, Appellant, v. SHAUGHNESSY ICE COMPANY, Respondent.

Third Department, July 7, 1921.

**Motor vehicles — action to recover for injuries to boy received while jumping from motor truck, being driven by unlicensed chauffeur — boy, who was riding with permission of driver, not trespasser — unlicensed chauffeur presumed to be incompetent — negligence to employ such person.**

The plaintiff, a boy about ten years of age, was not a mere trespasser at the time of his injury, where it appeared that during a street parade the plaintiff and another boy climbed onto defendant's motor truck and rode thereon with the permission of the driver, an unlicensed chauffeur, and

that the driver slowed down the car, at the same time telling the boys to get off, but before the plaintiff could do so the driver increased the speed of the car and the plaintiff fell off, rolled under the car and was seriously injured.

A person who is under eighteen years of age is presumed to be incompetent to drive a motor vehicle, and the employment of such a driver by the defendant, in violation of subdivision 2 of section 282 of the Highway Law, constituted negligence.

It was negligence on the part of the driver to carry the plaintiff in the first place, and the defendant having employed a known incompetent chauffeur, it was chargeable with the primary negligence and with the result which followed, because it must be presumed that if the car had been properly operated for the purposes for which it was designed the accident would not have happened.

It was negligence to permit the plaintiff to be on the car and, being thereon to the knowledge of the person in charge, it was little short of wanton disregard of human life to command him to get off and then increase the speed of the car as he was about to comply with the command.

APPEAL by the plaintiff, Brooks T. La Rose, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Rensselaer on the 4th day of June, 1920, upon the dismissal of the complaint at the close of plaintiff's case.

*Thomas F. Galvin*, for the appellant.

*Thomas F. Powers*, for the respondent.

WOODWARD, J.:

The plaintiff, a boy about ten years of age, appearing by his guardian *ad litem*, was seriously injured on the 28th day of September, 1918, in the city of Troy, while alighting from an automobile truck. In company with a boy fifteen years of age, who had been sent by the plaintiff's father to look after him, the plaintiff, in returning from a Liberty Loan parade, climbed upon an automobile truck owned and operated by the defendant, and in the immediate charge of one Harold Esmond, who was at the time about sixteen years of age. The plaintiff climbed upon the seat with the driver, rode there for some distance, when he changed positions with his companion, the latter getting upon the seat, while the plaintiff took his place upon the running board. This change of position appears to have taken place two or three times. At

the immediate time of the accident the plaintiff was on the running board of the car, which was passing along Fifth avenue from First to Fifth street. As the car approached Fifth street Esmond slowed down the car, called "All off," and the plaintiff, in obedience to the suggestion, let go of one of the iron bars to which he was clinging, and prepared to alight. While in this position Esmond increased the speed of the car, turning into Fifth street, and the plaintiff fell off, rolling under the car in such a manner as to be run over and seriously injured. At least there is evidence from which the jury might find these facts, and the appellant is entitled, on a judgment of nonsuit, to the most favorable view of the testimony which the jury might properly take.

It seems to us entirely clear that the plaintiff is not subject to the treatment of a mere trespasser; that the defendant owed him a higher duty than to merely refrain from doing him a wanton injury. The city was astir with the crowd which had assembled to witness a parade; the street cars and public busses were crowded to overflowing, and these boys, with others, were permitted, if not invited, to ride upon the defendant's truck. While it appears that they climbed upon the car from the rear there is no legitimate reason for assuming that this was done without the knowledge of the driver of the car, for both of these boys climbed upon the seat with him and rode for considerable distances, and the plaintiff's companion appeared to know the driver. Knowing their presence upon the car, the driver slowed down, told them all to get off, and then, without giving them an opportunity to do so, he increased the speed and the result complained of followed. Can it be said that a driver of mature years would be discharging the obligations of the defendant under these circumstances? We think not.

Subdivision 2 of section 282 of the Highway Law (added by Laws of 1910, chap. 374, as amd. by Laws of 1917, chap. 769)\* provides that "No person shall operate or drive a motor vehicle who is under eighteen years of age, unless such person is accompanied by a duly licensed chauffeur or the owner of the motor vehicle being operated." It is obvious that the Legislature,

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\* Since amd. by Laws of 1919, chap. 472.—[REp.]

which might have excluded such motor vehicle from the highways altogether, had a right to prescribe the conditions on which it might be operated, and that it attempted to place such vehicles in charge of responsible persons; there must be a licensed chauffeur or the owner of the car present at all times in order that the vehicle could be lawfully operated. In other words, the Legislature deemed it important that motor vehicles should be in the immediate charge of persons of mature years and responsibility, and the defendant's negligence in the present case consists in employing a person whom the law presumes to be incompetent. Presumably, if the owner of this truck, designed for carrying heavy loads, had been personally present he would not have permitted a lot of boys to get upon it and to change positions as the plaintiff and his companion did while the car was in motion, and this would have been, or should have been, the case if the car had been in charge of a duly licensed chauffeur. It was negligence on the part of the driver to carry these boys in the first instance, and the defendant having employed a known incompetent chauffeur it was chargeable with the primary negligence, and with the results which followed; because it must be presumed that if the car had been properly operated for the purposes for which it was designed the accident would not have happened. The defendant cannot be heard to say, while operating its car in violation of law, that it owed the plaintiff no higher duty than that which it owed to a mere trespasser. The defendant itself was a trespasser upon the public highways, because it had its car there in violation of law, and the rule has been recognized from an early day in the jurisprudence of this State that "' No cause of action can arise from an undertaking prohibited by statute, whether the contract is *malum in se*, or *malum prohibitum*. (*Peck v. Burr*, 10 N. Y. 294, 299)' " (*Village of Fort Edward v. Fish*, 156 N. Y. 363, 373), and it may be doubted whether the plaintiff's alleged contributory negligence could be availed of by a defendant who produced the accident in the very act of violating the provisions of a positive statute. It was negligent to permit the boys to get onto this car; it may not be assumed that they would have been permitted to be on the car if it had been lawfully operated. Being upon the car, to the

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knowledge of the person in charge, it was little short of wanton disregard of human life to command them all to get off and then increase the speed of the car around a corner, as the evidence shows was done in the present case. We can hardly conceive of a mature and competent person doing what the defendant's unlawful chauffeur did in the present instance, and we cannot believe that the law is satisfied by the judgment in this case. The plaintiff clearly presented evidence entitling him to go to the jury, and it was error to grant the motion of the defendant. It does not seem necessary to review the authorities cited by the appellant, though it seems clear that the case of *Gallenkamp v. Garvin Machine Co.* (91 App. Div. 141), as finally disposed of upon the dissenting opinion of INGRAHAM, J. (179 N. Y. 588), foreshadows the conclusion here reached, and that it is in harmony with the spirit of the law generally.

The judgment appealed from should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concur.

Judgment reversed and new trial granted, with costs to the appellant to abide event.

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LUIGI CASELLA, Respondent, v. MICHELE GALLO, Appellant,  
Impleaded with BARNEY COHN, Defendant.

Third Department, July 7, 1921.

**Deeds — restrictive covenant not to build within stated number of feet from street — covenant not mutually restrictive — right of way for persons, wagons and animals — reservation to be construed as of date when made — reservation does not include passage for large motor trucks — covenant not violated by constructing balcony over right of way eight feet above it.**

Under a covenant contained in a deed that in case a building is erected on the lot conveyed it shall be a stated distance from the street, it is no defense to an action to compel the removal of the building to the line



agreed upon or for damages, that the successor in interest of the grantor had constructed a building upon his lot adjoining, practically upon the street line.

A reservation of a right of way made in 1877 "for persons and wagons, animal or animals, on the rear of said premises," is to be construed in the light of the conditions existing at the time of the reservation, and the court will take judicial notice of the fact that such a right of way did not contemplate a passageway for the modern moving van with large and cumbersome load.

Accordingly, where the right of way was maintained as of the same width or wider than at the beginning no encroachment is shown by the construction of a balcony over it more than eight feet above the ground.

JOHN M. KELLOGG, P. J., and KILEY, J., dissent.

APPEAL by the defendant, Michele Gallo, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Broome on the 4th day of January, 1921, upon the decision of the court, rendered after a trial without a jury, at the Broome Trial and Special Term.

*Mangan & Mangan* [Thomas J. Mangan of counsel], for the appellant.

*Charles H. Burnett* [George M. Le Pine of counsel], for the respondent.

WOODWARD, J.:

The complaint alleges that on and prior to the 17th day of July, 1877, one Hiram S. Rummer was the owner and in possession of certain premises described therein, and that on said day the said Rummer sold and conveyed a portion of said premises to one Charles F. Notez, reserving from such conveyance "a right of way for persons and wagons, animal or animals, on the rear of said premises." In the deed conveying such premises it was provided that the "said Charles F. Notez for himself and his assigns agrees and binds himself that in case a building is erected upon said premises here conveyed, it shall be built at least four feet from said Hiram S. Rummer's building and the same distance from Whitney street, that said Rummer's is."

The present owner of the premises so conveyed to Notez has constructed a building abutting practically upon the street line, some eight or ten feet nearer Whitney street than

the building owned by Rummer at the time of making the reservation, and the plaintiff, owner of the original Rummer premises, brings this action in equity to compel the removal of the building to the line agreed upon, or for damages; and the learned court at Special Term has given judgment for the sum of \$1,800, with an addition of \$500 for an alleged encroachment upon the right of way reserved in the deed.

While it might be plausibly argued that it was the intention of the parties to mutually restrict the premises, and that the plaintiff by building out to the street line upon his own property has furnished a justification for the defendant's encroachment, such an intention is not expressed in the deed, and as all the parties through whom the property has passed had notice of the provisions of the instrument we are unable to discover any reason for disagreeing with the court at Special Term in so far as the judgment relates to the location of the building upon defendant's premises. The learned court has discussed the question in harmony with the authorities as we find them, and we discover no failure in the evidence to justify the damages awarded in this particular.

We are, however, unwilling to agree that the damages awarded for an alleged encroachment upon the right of way reserved can be justified by the evidence. The language of the reservation is that of the grantor, and "reserves a right of way for persons and wagons, animal or animals, on the rear of said premises." No dimensions of the right of way are given, and there is no dispute that the present right of way which has been kept open is wider than for a considerable period while the original owners were in possession. The alleged encroachment is not found in the matter of the width of the right of way, but in the fact that the defendant has erected a porch above the first story of his building, which is supported by timbers attached to the lower portion, and one witness testifies that there is not room for a van or a large vehicle containing a large load of goods to pass through the passageway since the erection of this porch, and the court has found this as a fact. But this reservation was made in the year 1877; it does not purport to be a right of way for a large vehicle with a large load of goods, or for a van, such as we know in this day of the gasoline engine and

automobile. It dealt with conditions as they existed in 1877, and this court will take judicial notice of the fact that a right of way "for persons and wagons, animal or animals" did not contemplate a passageway for the modern moving van with its large and cumbersome load. While it is reasonable to assume that it was intended that loaded wagons should be able to pass through, there is nothing in the language used in 1877 to indicate that it was intended that there should be no encroachment upon the right of way such as is described in the evidence. There is no evidence in this case that a loaded wagon, with horses or animals drawing it, could not conveniently pass through this passageway, and there is no justification for holding the defendant liable for damages for extending his porch out over the driveway, the fee of which he owned subject only to the right of way specifically reserved. A reservation of an easement or other servitude by deed always results in the creation of something new, *i. e.*, something which did not before exist as an easement or servitude, and in retaining it as an item of property belonging to the grantor. Being thus brought into existence, as property, by the deed itself, it must always be incorporeal. (Reeves Real Prop. § 136.) There was an incorporeal right, not to the exclusive use of the land, but to a right of way over the land which was conveyed to the defendant's predecessor in title, and this right was, by its language, limited to "persons and wagons, animal or animals." If some one had testified that there was not room for the passage of a mastodonsaurus it would hardly be suggested that there was a failure to preserve the rights of the owner of the right of way, and it seems equally clear that the court erred in holding that there was an encroachment upon the right of way reserved because some one thought there was not room for a vehicle which was unknown at the time the engagement was entered into. The general rule is that a man who owns land subject to an easement has a right to use his land in any way not inconsistent with the easement, and that the extent of the easement claimed must be determined by the true construction of the grant or reservation by which it is created, aided by any circumstances surrounding the estate and the parties which have a legitimate tendency to show the intention of the parties. (*Herman v.*

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*Roberts*, 119 N. Y. 37, 43, and authorities there cited.) Here we have the clearly expressed limitations of the reservation; it is "for persons and wagons, animal or animals," and the evidence discloses that there is a passageway over nine feet in width, something over eight feet in height, and there is literally no evidence that it does not afford a free passageway for persons and wagons, animal or animals, such as were within the contemplation of the parties in the year 1877.

The judgment should be modified by striking out the sum of \$500, and as so modified should be affirmed, without costs to either party.

All concur, except JOHN M. KELLOGG, P. J., and KILEY, J., who vote for reversal.

Judgment modified by striking out the sum of \$500, and as so modified affirmed, without costs to either party.

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F. LEONARD BURCHARD and JOHN T. BALL, as Executors, etc., of HORATIO P. BALL, Deceased, Respondents, v. JOHN BARTON PAYNE, as Agent Appointed by the President, under Section 206 of the Transportation Act,\* Appellant.

Third Department, July 7, 1921.

**Railroads — construction of bridge over tracks as substitute for previous highway — railroad company not liable for injuries resulting from automobile crashing through defective barrier on bridge in absence of notice required by Railroad Law, § 93 — barriers constitute part of roadway as distinguished from framework and abutments of bridge.**

Under section 93 of the Railroad Law providing that "When a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality having jurisdiction over and in which the same are situated; except that in the case of any overhead bridge constructed prior to the first day of July, eighteen hundred and ninety-seven, the roadway over and the approaches to which the railroad company was under obligation to maintain and repair, such

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\* See 41 U. S. Stat. at Large, 461, § 206; Pres. Proc. March 11, 1920, and May 14, 1920; 41 U. S. Stat. at Large, 1789; Id. 1794.—[*Rep.*

obligation shall continue, provided the railroad company shall have at least ten days' notice of any defect in the roadway thereover and the approaches thereto," a railroad company, required by its charter in crossing a highway to restore the same "to its former state, or to such state as not unnecessarily to have impaired its usefulness," which, prior to the original enactment of the aforesaid provision of the Railroad Law, constructed a bridge twenty feet over its tracks which was in effect merely a substitute for the previous roadway, and erected barriers along both sides thereof, cannot be held liable for damages resulting after the enactment of said statute from an automobile crashing through one of the barriers which was defective, in the absence of at least ten days' notice from the town superintendent of highways of said defect, since said barriers constitute a part of the lawful roadway as distinguished from the framework of the bridge and its abutments.

KILEY, J., dissents, with memorandum.

APPEAL by the defendant, John Barton Payne, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Schenectady on the 14th day of October, 1920, upon the verdict of a jury for \$20,000, and also from an order entered in said clerk's office on or about the same day denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*Lewis E. Carr*, for the appellant.

*Arthur W. Morse*, for the respondents.

WOODWARD, J.:

Horatio P. Ball, whose executors bring this action, was killed on July 17, 1918, when an automobile in which he was riding with other gentlemen ran off a bridge erected by the Albany and Susquehanna railroad to carry the highway over its tracks in the town of Duanesburgh back in 1861 or 1862, and since altered and maintained by its successor, this railroad being in the control of the Federal government at the time of the accident and its agent now appearing as the defendant, appellant. The action was originally brought against the town of Duanesburgh and the Director-General of Railroads, and upon the first trial the action was dismissed as to the town, but continued as against the Director-General. The jury disagreed and the case was retried, resulting in a verdict of \$20,000 against the defendant. A motion for a new trial on the

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minutes was made and denied, and the previous motion to dismiss the complaint was in like manner denied. The defendant appeals from the judgment and order.

There is no serious contention that the verdict is not justified if, as matter of law, the plaintiffs were entitled to recover. At the time of the construction of the railroad it became necessary, in the practical work of construction, to change certain highways. The railroad, at the point of intersection with the highway, had to be lowered some twenty feet below the common level, and two highways were merged in one and both were carried over the railroad by a bridge, which was in effect merely a substitute for the previous roadway. This change involved some engineering matters which undoubtedly made for a dangerous situation at the bridge, and to obviate this danger, in compliance with the requirement of the statute that in crossing a highway the railroad should restore the same "to its former state, or to such state as not unnecessarily to have impaired its usefulness" (Laws of 1850, chap. 140, § 28, subd. 5; *Bryant v. Town of Randolph*, 133 N. Y. 70, 77, and authority there cited), the railroad company erected barriers along both sides of this bridge and maintained them for a long period of years. (See, also, Laws of 1880, chap. 133, and Laws of 1887, chap. 724, amdg. said § 28, subd. 5; revised by Railroad Law [Gen. Laws, chap. 39; Laws of 1890, chap. 565], § 11; now Railroad Law [Consol. Laws, chap. 49; Laws of 1910, chap. 481], § 21, as amd. by Laws of 1913, chap. 743, and Laws of 1916, chap. 109.) There is no doubt that the statutory requirement was continuing, and that the railroad company rested under all the obligations and duties imposed by its charter (*Bryant v. Town of Randolph*, *supra*; *Bush v. D., L. & W. R. R. Co.*, 166 N. Y. 210, 218, and authority there cited) subject to the right of the Legislature to alter or amend the same. (See Const. art. 8, § 1.) The accident in which Mr. Ball was killed is claimed to have been due to the fact that the automobile came upon this bridge by way of a reverse curve in such a manner that it came in contact with one of these barriers, which, being decayed and weak, gave way and the automobile was precipitated to the track some twenty feet below, resulting in killing three of the four occupants of the car. We shall assume that if there had been

no modification of the duty of the railroad company in respect to this bridge the judgment here under consideration would be open to no serious objections.

In 1897 the Legislature enacted chapter 754 of the Laws of that year, commonly known as the Grade Crossing Law, and thereby added sections 60 *et seq.* to the then existing Railroad Law (Gen. Laws, chap. 39; Laws of 1890, chap. 565). Section 64 of the Railroad Law, as added by that act, provided that "when a highway crosses a railroad by an overhead bridge, the frame work of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality in which the same are situated;" and while this might have been confined to railroads where grade crossings were eliminated under the provisions of the act, the court, in *Bush v. D., L. & W. R. R. Co.* (166 N. Y. 210, 224), held that "as the language of the statute is sufficiently broad to include existing bridges, we have held that it applies to such bridges, and the question is not an open one in this court." (Citing *City of Yonkers v. N. Y. C. & H. R. R. Co.*, 165 N. Y. 142.) Subsequently, and in 1902 the Legislature enacted chapter 140 of the Laws of that year, amending section 64 by adding to the clause above quoted the exception "that in the case of any overhead bridge constructed prior to the enactment of sections sixty-one and sixty-two of this act, the roadway over and the approaches to which the railroad company was under obligation to maintain and repair, such obligations shall continue, provided the railroad company shall have at least ten days' notice of any defect in the roadway thereover and the approaches thereto, which notice must be given in writing by the commissioner of highways or other duly constituted authorities, and the railroad company shall not be liable by reason of any such defect unless it shall have failed to make repairs within ten days after the service of such notice upon it." (See, also, Laws of 1909, chap. 153, amdg. said § 64. Now Railroad Law [Consol. Laws, chap. 49; Laws of 1910, chap. 481], § 93, as amd. by Laws of 1913, chap. 744, and Laws of 1916, chap. 484; since amd. by Laws of 1921, chap. 698.)

Obviously, this amendment of the statute operated to relieve the municipality of the absolute obligation to keep in repair "the roadway thereover and the approaches thereto," as the statute had been construed in *City of Yonkers v. N. Y. C. & H. R. R. Co.* (*supra*), and restored the obligation of the railroad company, under the circumstances existing in this case, to maintain the entire structure, for its duty under the original charter was to restore and maintain highways crossed by it to their former state, "or to such state as not unnecessarily to have impaired its usefulness." (*Bryant v. Town of Randolph, supra*; *Bush v. D., L. & W. R. R. Co.*, 166 N. Y. 210, 221.) In the latter case the court say that "since 1835\* the liability of railroad companies for injuries occasioned by their neglect to restore and maintain highways crossed by their railroads to their former state so as not to impair their usefulness, has never been questioned nor denied," and this rule now applies to the appellant, subject, however, to the proviso that "the railroad company shall have at least ten days' notice of any defect in the roadway thereover and the approaches thereto." (Railroad Law, § 93.) It had been held in *Bryant v. Town of Randolph (supra)* that the approaches to a railroad crossing constructed by the railroad company in compliance with the statute, and within the right of way of the railroad company, were still within the jurisdiction of the commissioner of highways, and that the town was liable for a neglect of the commissioner of highways to provide a barricade where the circumstances were such as to require it for the protection of the traveling public. The town superintendent of highways has since succeeded to the jurisdiction of the commissioner of highways. It was entirely logical, therefore, to provide in the statute that the liability of the railroad company should depend upon a notice of "any defect in the roadway thereover and the approaches thereto," and as barriers upon the highway are required only where there are precipices, excavations, steep banks, deep water, etc., within or without the limits of the road, where they are so imminent to the line of public travel as to expose travelers

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\* See Laws of 1835, chap. 300.—[REp.]



to unusual hazards (*Scannal v. Cambridge*, 163 Mass. 91, 93; *Adams v. Inhabitants of Natick*, 13 Allen, 429, 431), it can hardly be doubted that the barriers upon this bridge, which was a mere substitute for the previous highway, constituted a part of the lawful roadway within the jurisdiction of the town superintendent of highways, as distinguished from the framework of the bridge and its abutments, and that it was necessary, under the law, that the railroad company should have had notice from the town superintendent of highways of the defect complained of in order to charge it with liability to the plaintiffs in this action. The change in the original highway made necessary by the construction of the railroad brought about the necessity for the barriers; they constituted a part of the necessary work in restoring the highway so "as not unnecessarily to have impaired its usefulness," and as the roadway as thus amended could not be a lawful roadway without the barrier it constituted a part of the roadway which was peculiarly for the town superintendent of highways to look after, under the view taken of the question in the *Bryant Case* (*supra*), and the defendant is not liable, no notice having been given.

The judgment and order appealed from should be reversed.

All concur, except KILEY, J., dissenting, with a memorandum.

KILEY, J. (dissenting):

Mr. Justice WOODWARD advises reversal of this judgment on the sole ground that the notice provided for, under certain conditions, in the Railroad Law, section 93, was not given to the railroad. I do not think any notice was required of the Highway Commission. Section 93 of the Railroad Law (as amd. by Laws of 1916, chap. 484),\* covering the circumstances existing here, reads as follows: "When a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality having jurisdiction over and in which the

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\* Since amd. by Laws of 1921, chap. 698.—[Rmp.]

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same are situated." Then follows the exception to which Mr. Justice WOODWARD refers and upon which, if followed, this defendant escapes liability. It is as follows: "Except that in the case of any overhead bridge constructed prior to the first day of July, eighteen hundred and ninety-seven, the roadway over and the approaches to which the railroad company was under obligation to maintain and repair, such obligation shall continue, provided the railroad company shall have at least ten days' notice of any defect in the roadway thereover and the *approaches thereto*," which notice must be in writing, etc. The learned judge says that if it was not for the alleged omission the judgment should be sustained. That exception does not apply to conditions here, unless we are going to hold that the railing was not a part of "the framework of the bridge," and affirmatively hold that the railing is a part of the "roadway" and "approaches." I do not think it bears any such construction; I think the railing was a part of "the framework of the bridge" which under the law the defendant railroad company was bound to keep in repair and without notice.

I favor affirmance.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

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NATHAN JACOBS and MOLLIE E. JACOBS, Respondents, v.  
WILLIAM W. MULFORD and Others, Appellants.

Third Department, July 7, 1921.

**Replevin — joint action to recover possession of goods — counterclaim against one of plaintiffs to recover possession of other goods not maintainable — breach of contract on part of one of plaintiffs cannot be asserted as counterclaim.**

In an action of replevin brought by two plaintiffs jointly to recover possession of certain goods a counterclaim based on the conversion of certain other and different property by one of the plaintiffs cannot be asserted under section 501 of the Code of Civil Procedure.

A breach of contract on the part of one of the plaintiffs, but in nowise involving the other plaintiff, cannot be asserted as a counterclaim.

APPEAL by the defendants, William W. Mulford and others, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Greene on the 21st day of October, 1918, sustaining plaintiffs' demurrer to two counterclaims.

*Brinnier, Canfield & Brinnier* [William D. Brinnier and Palmer Canfield, of counsel], for the appellants.

*Edward W. Lackey*, for the respondents.

WOODWARD, J.:

The complaint alleges that at the time of the commencement of this action the plaintiffs were the owners of and entitled to the immediate possession of the articles mentioned in a schedule attached to the complaint of the value of \$3,678; that the defendants have become possessed of and wrongfully detain from the plaintiffs the articles mentioned in the schedule, and that prior to the commencement of this action the plaintiffs duly demanded of defendants that they return the said articles, and that the defendants have refused to do so. The demand for judgment is the return of the goods or the payment of their value. The action is clearly one for replevin, involving elements of conversion, and sounds in tort.

The defendants deny all of the material facts, except that they admit that they have possession of certain of the personal property mentioned in the complaint. They then allege as a defense that they are the owners of a certain hotel property known as the Mountain Summit House in Tannersville, Greene county, and that on the 12th day of September, 1904, they leased said premises to Mollie E. Jacobs, one of the plaintiffs, together with the furniture therein, to be used as a summer hotel for the term of five years, with the privilege of a five-year renewal; that the said Mollie E. Jacobs agreed to make certain improvements, and that she exercised the option of renewing the lease, and that "at the expiration of said renewed term, and on or about September 15th, 1914, the said plaintiff, Mollie E. Jacobs, as such lessee, surrendered the said premises together with the fixtures and equipment there at said time, including the furniture and furnishings, to

these defendants, and these defendants have been lawfully possessed of said fixtures, equipment, furniture and furnishings since said time."

The plaintiffs' demurrer to this much of the answer has been overruled, and no appeal has been taken from the order in this regard.

Further answering, the defendants as a defense and counterclaim reallege the matters set up as a defense and that "said plaintiff, Mollie E. Jacobs, wrongfully removed and took from said hotel and premises certain personal property furnished by these defendants and leased with said premises, and she wrongfully retains same or has wrongfully disposed of same. That these defendants are the owners thereof and entitled to the immediate possession thereof, and same are of the reasonable value of \$5,022.40; that prior to the commencement of this action these defendants duly demanded of said plaintiff the return thereof, but she has failed and neglected so to do; that hereto annexed is an itemized statement of said articles, marked A, and made a part hereof."

The plaintiffs demurred to this counterclaim, and the court has sustained the demurrer, the defendants appealing. It is to be remembered that there are two plaintiffs. They allege ownership of certain definite personal property concededly in the possession of the defendants, who refuse to deliver the same on demand. The defendants allege as a counterclaim a conversion of certain other and different property, not by the plaintiffs, but by one of them. The question presented is whether this is such a claim as may be asserted as a counterclaim under the provisions of section 501 of the Code of Civil Procedure. The court at Special Term has held that it is not, and we are persuaded that this determination ought not to be disturbed.

The provisions of the Code of Civil Procedure are that a counterclaim "must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff \* \* \* and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action: 1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of

the plaintiff's claim, or connected with the subject of the action. 2. \* \* \*." Subdivision 2 is not involved here. This is not an action on a contract; it is for the wrongful withholding of property alleged to belong not to Mollie E. Jacobs but to the plaintiffs jointly, and the fact that the defendants may have a like cause of action against one of the plaintiffs for the conversion of other and different personal property does not bring the case within the provisions of the statute. The plaintiffs, as joint owners of the property set forth in the complaint, are entitled to recover the property or its value if they succeed in this action, and a judgment against Mollie E. Jacobs for converting some other property would not tend to diminish the amount to which the joint plaintiffs are entitled. Section 446 of the Code of Civil Procedure provides that "all persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly prescribed in this act," and section 448 provides that "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, except as otherwise expressly prescribed in this act," and we find no provision which interferes with the right of joint owners of personal property to bring an action for its recovery. Their interests being joint they are in legal effect but one party, and their joint interests cannot be affected by the fact that one of the plaintiffs has committed a wrong upon or against the property of the defendants. The defendants would have no cause of action against the plaintiffs in this action jointly, and they cannot interpose a claim against one of them for the purpose of diminishing or defeating the cause of action vesting in both of them. Moreover, under well-considered authorities, the alleged conversion by the plaintiff Mollie E. Jacobs did not arise out of the transaction which the plaintiffs allege as their cause of action — the claim for a conversion of certain specified articles by the defendants. The conversion is the transaction or subject of the action; this conversion took place when the plaintiffs demanded the return of the property and the defendants refused compliance, and there is nothing in the pleadings to show that the alleged conversion of other goods by the plaintiff Mollie E. Jacobs had any relation whatever to the acts of the defendants in

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refusing to deliver the goods belonging to the plaintiffs jointly. It may have afforded the excuse for this action, but the excuse is not the transaction or the subject of the action. (*Rothschild v. Whitman*, 132 N. Y. 472, 476.) The case of *Van v. Madden* (132 App. Div. 535, 537, 538) and the authorities therein cited and relied upon seem to dispose of this question.

The defendants plead a second counterclaim, alleging a breach of contract on the part of the plaintiff Mollie E. Jacobs, but in no wise involving the other plaintiff, and we are clearly of the opinion that this cannot be availed of in the present action. The principles involved are substantially those which we have already considered, and it does not seem necessary to go over the grounds again.

The order appealed from should be affirmed, with costs.

Order unanimously affirmed, with ten dollars costs and disbursements.

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In the Matter of the Application of ANDREW KINUM, Landlord,  
Appellant, for the Removal of ELIZABETH W. KINUM,  
Tenant, Respondent, from Certain Real Estate.

Third Department, July 7, 1921.

**Landlord and tenant — summary proceedings to dispossess — tenant dying one week after expiration of year — widow not entitled to possession for remainder of year where notice to quit served about six weeks after expiration of year.**

The widow of a tenant is not entitled to hold possession as against the landlord where it appears that her husband, who was a tenant from year to year, died about one week after the expiration of the year and that the landlord served notice on her to give up possession about six weeks after the expiration of the year, for the option is with the landlord to regard the holding over by his tenant as an implied agreement on the part of the tenant to hold for another year or to treat the tenant as a trespasser.

APPEAL by the petitioner, Andrew Kinum, from an order of the County Court of the county of Schenectady, entered in the office of the clerk of said county on the 20th day of

March, 1919, dismissing the petition, and also from an order entered in said clerk's office on the 22d day of March, 1919, denying petitioner's motion to set aside the verdict and for a new trial made upon the minutes.

*Borst & Smith* [*Homer J. Borst* of counsel], for the appellant.

*Harry G. Coplon*, for the respondent.

WOODWARD, J.:

The petition of Andrew Kinum, of the city of Schenectady, alleges that on or about the 1st of October, 1914, John Kinum, now deceased, went into the employ of the petitioner upon a farm owned by said petitioner for an agreed compensation, including the rental of a house upon the farm; that the said John Kinum continued in the employment until his death on the 23d day of October, 1918; that since said time the widow of John Kinum has continued in possession of the said premises as a tenant at will or sufferance of the petitioner, and that on or about the 30th day of November, 1918, the petitioner caused to be served upon said Elizabeth W. Kinum a notice to vacate, deliver and surrender up possession of the said premises on or before January 1, 1919; that the tenancy was thus terminated and that the tenant holds over and continues in possession after the expiration of said term without the permission of the petitioner. Application is made for a final order dispossessing the tenant.

The answer of Elizabeth W. Kinum admits ownership in the petitioner, the receiving of the notice to remove, and denies the other allegations of the petition, setting up as an affirmative defense that John Kinum died on or about the 23d day of October, 1918; that thereafter and on or about the 9th day of November, 1918, she applied for and received letters of administration; that heretofore and on or about the 15th day of October, 1917, the said John Kinum entered upon the premises as tenant of his father, the petitioner, at a rental of \$150; that the said John Kinum, deceased, continued to occupy the said premises after the expiration of the term of one year, and that by reason thereof said lease

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automatically renewed itself for the period of another year terminating October 15, 1919. The petitioner replied, denying the matters alleged in defense.

The case went to trial, resulting in an order dismissing the petition, and the petitioner appeals therefrom.

Assuming the facts as they must have been found by the jury, that John Kinum became the tenant of the petitioner for a period of one year, and that he held over during the period from October 15, 1918, to the twenty-third day of October in the same year, when he died, how can this be a defense to the proceeding for the removal of the widow? The rule is undoubted that where a tenant having a lease for one year holds over at the expiration of his term the law implies an agreement on his part to hold for another year upon the terms of the lease, but the option is with the landlord to so regard it or to treat the tenant as a trespasser. (*Schuyler v. Smith*, 51 N. Y. 309, 314; *Haynes v. Aldrich*, 133 id. 287; *Dagett v. Champney*, 122 App. Div. 254.) In this case the landlord has elected to treat the widow as a trespasser; he has given proper notice, and under the provisions of the Code of Civil Procedure (§§ 2231, 2232 *et seq.*) he is entitled to the order applied for in his petition. The court was clearly in error in refusing to charge the law as requested by the petitioner.

The orders appealed from should be reversed, and the petitioner should have the relief prayed for in his petition.

All concur.

Orders reversed, without costs, and relief granted to the petitioner in accordance with the opinion.



ROBERT P. McKEE, Respondent, v. LOUIS F. ROBERT,  
Appellant.

Third Department, July 7, 1921.

**Libel** — action by manager and editor of newspaper for personal damages — allegation that plaintiff was injured as manager and editor need not be preceded by formal phrase "of and concerning" his business — said question cannot be raised first on appeal — refusal of court to charge jury upon "each independent statement in the pamphlet" not error — evidence establishing malice — verdict not excessive — technical errors disregarded under Code of Civil Procedure, § 1317.

In an action by a newspaper manager and editor to recover personal damages for libel based on a pamphlet printed and published by the defendant, in which the plaintiff alleged that he was injured in his reputation, good name and credit as manager and editor of a newspaper of which he was in control, it was not necessary for him to precede said allegation by the formal phrase "of and concerning" his business.

Furthermore, since defendant did not take advantage of said defect by demurrer or on the trial, and took no exception to the charge of the court that the jury were to examine into the proposition as to whether the plaintiff had been damaged by the article in his business or profession, the defendant cannot raise the question on appeal.

It was not error for the court to refuse to charge the jury upon each independent statement in the pamphlet and to say in effect that if the statement so taken bodily from its surroundings was not libelous, it made up no part of plaintiff's cause of action; the whole libel was a part of the complaint, and detached statements cannot be set apart to destroy the connection of the whole.

The evidence clearly establishes malice and the verdict for \$3,000 in favor of the plaintiff was not excessive.

Moreover, the judgment is so obviously just that any technical error should be disregarded under section 1317 of the Code of Civil Procedure.

**APPEAL** by the defendant, Louis F. Robert, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Essex on the 21st day of September, 1920, on the verdict of a jury for \$3,000.

*Weeds, Conway & Cotter* [T. B. Cotter and F. E. Smith of counsel], for the appellant.

*Patrick J. Tierney*, for the respondent.

KILEY, J.:

The appellant swears that, in order to get even with the respondent for criticising, in the newspaper of which he is editor and manager, a fight between appellant and another resident of Ausable Forks, in the lobby of the theatre in that place, he prepared, had printed and circulated throughout that country, of and concerning the respondent, the following vicious and malicious article, viz.:

“THE RECORD’S RELIABILITY

“The Adirondack *Record* has published a very pretty little article about the class of entertainments that the Bridge Theatre is furnishing its patrons, especially the one given on Friday evening, December 26, which they say has not been equaled for true degeneracy and filthiness in a very long time. Now, we wish to say that if any one would like to know something about filth and degeneracy, they need not wait for the evening and the Theatre, but call on the editor of the *Record* at any time and listen to his stories of himself.

“We would like very much to have them explain the meaning of the word ‘profanity,’ also, as the term LIAR was the nearest thing to profanity that was used during the so-called entertainment, and, if that is classed as profanity in the *Record’s* dictionary, we would like to get a copy.

“The item regarding the Chairman of the Red Cross offering to referee a fight between the parties who were quarreling must have been inserted to help fill up the columns, or as a sample of the *Record’s* news, as the person referred to was in New York City at the time, and did not learn of the trouble until he saw the brilliant talk in the *Record*.

“In a recent issue of that ably (?) edited sheet — The Adirondack *Record* — under date of December 26, we believe this ‘great’ reformer, or performer, referred to ‘that terribly corrupt town of Black Brook’ and to its citizens as bootleggers, and to the town authorities as incompetents.

“All you have to do is to listen to this actor a few minutes, and you will realize that his hat covers the worst corruption in the entire town.

“Again listen to him, and you will learn from his own lips that he is a ‘booze fighter,’ gambler and immoral man. Yet this hypocrite — every time he hears of any one using a little

'fire water,' as he calls it, or perhaps committing some little offense, he rushes into print to vilify the party; when, as a matter of fact, judging from what he says, he punishes more 'fire water' than any 'gutter pup' was ever known to.

"This great apostle of prohibition said that he attended a meeting of the Board of Supervisors at Elizabethtown recently, and upon his return, he told anybody that wanted to listen to him, that 'at a certain dinner, we paid Ben Stetson \$235 for whiskey.' This may be so, and may not; however, MORAL: Ben, do not trust any low-grade talking machine. A slight jar sometimes set these self-winders off, and they tell things.

"We would suggest to this hypocrite that if he wants to publish a real sensational story—something that would eclipse anything that he has ever printed along the lines of degeneracy and filthiness—to devote several columns about himself every week for the year of 1920. You cannot camouflage the people.

"In conclusion, we wish to say that the most of the representative citizens of Ausable Forks unite in saying that if the *Record's* chief representative could be treated to a ride out of the town on a fence rail with a nice coat of tar and feathers as wearing apparel, it would be as good a thing as could happen to the town."

Before having the article printed the appellant visited an attorney, a district attorney, and swears his purpose in so doing was to avoid any penalty the law might exact for doing a citizen such damage as such a publication was calculated to produce. That he admits the preparation, the publication, and the circulation of said article, and for the purposes above set forth, appears from the record. This action is the result of such publication and circulation. To the complaint in the action the appellant, defendant, makes three defenses—justification, mitigation, and with an audacity, superb and incomprehensible, he swears that the handbill was honestly and truthfully prepared without malice or desire to injure the plaintiff, respondent, here. From the evidence of the defendant it clearly appears that such allegation is false. The complaint, which set forth the libel in full, alleges that by reason of its publication plaintiff was injured in his reputation (individually), and that he was injured in his

reputation, good name and credit as manager and editor of the newspaper of which he was in control. The trial resulted in a verdict for the plaintiff. The appellant urges that the allegation as to damage to his reputation as editor, etc., should have been preceded by the cut and dried allegation, "of and concerning" his business. There are several answers to that objection. *First*. The defendant did not demur; such defect, if it is a defect, appeared on the face of the complaint. *Second*. It was tried without objection comprehending appellant's now alleged position. *Third*. It was submitted to the jury without exception to the charge in that regard, viz., the main charge — this does not refer to requests to charge. The complaint asks for personal damage, not for damage to his business. The paper plaintiff publishes is not owned by him; the loss of credit and reputation that he complains of is not the loss and credit to the business, but to himself. He, as an individual, by such publication, was crippled and lessened in his ability to do the business he was required to do to fill the position of trust and service with which he had been intrusted. The time is passed when courts will permit great wrong to go unredressed because of some slight technical error; that form plays less part than substance in the administration of the law to-day, as applied to libel cases, may be seen from an examination of *Morrison v. Smith* (177 N. Y. 366); *Klaw v. New York Press Co., Ltd.* (137 App. Div. 686); *Metcalfe v. Bill Board Publishing Co.* (176 id. 859); *Corwin v. McKenzie* (190 id. 953). The court submitted the claim of the plaintiff to the jury in the following language: "If the plaintiff is entitled to recover in this action, he would be entitled to recover, *first*, what is known as compensatory damages. That is, such damages as would naturally flow from the publication of the article — if you find that he has been damaged by the article, and that is always provided you find that he has been damaged. *Secondly*, you will examine into the proposition as to whether he has been damaged by this article in *his* business or profession," not whether the business of the corporation for which he works has been damaged, but has the plaintiff, in his capacity to do that business for his employer been damaged. No exception was taken, and appellant says he did not have to except, that he could sit idly by and let the charge go

to the jury and raise the question for the first time on appeal. Our attention is called to *Fremd v. Halsted* (179 App. Div. 910) as laying down the doctrine that an exception was not necessary to raise the point. An examination of that case discloses that the judgment was so excessive and obviously unjust that it was reversed for that reason. Again in *Barden v. N. Y. C. R. R. Co.* (181 App. Div. 306) it was shown that a practically complete defense was available to the defendant in the contributory negligence of the plaintiff. The court charged that there was no contributory negligence. The Appellate Division held that the theory upon which he so held was wrong; that the question making up part of the case on the part of the defense was affirmatively excluded; that is much different from the question we have here. The whole libelous article was set forth in the complaint, and was before the jury. The plaintiff had the right to go to the jury on the meaning of the article without reference to any innuendo and the jury had a right to say that each of the allegations as to his individual damage, viz., being held up to public ignomy and disgrace and also the crippling of his influence as editor, by destroying his reputation, thereby entailing a personal loss, had or had not been proved. (*Metcalf v. Bill Board Publishing Co.*, *supra*.) If the article is susceptible of two meanings, or even if a wrong innuendo is pleaded, the case must go to the jury. (*Klaw v. New York Press Co., Ltd.*, 137 App. Div. 688.) There was nothing wrong with the theory upon which this case was tried. The case was one properly sent to the jury. (*Triggs v. Sun Printing & Pub. Assn.*, 179 N. Y. 144.) The respondent in his brief makes an error in a quotation from *Sanderson v. Caldwell* (45 N. Y. 398, at p. 405 of the opinion). The correct quotation is "when the words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, and to impair confidence in his character or ability, when, from the nature of the business, great confidence must necessarily be reposed, *they are actionable*, although not applied by the speaker to the profession or occupation of the plaintiff." The words above quoted, "they are actionable," are quoted by respondent as reading "they are *not* actionable." The difference is clearly apparent

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when applied to the facts in this case. The quotation from the charge (*supra*) was a proper presentation of the issue. (*Woods v. Gleason*, 18 App. Div. 401, last paragraph of the opinion.) The ground most strenuously urged as fatal to this judgment is the refusal of the court to charge the jury upon "*each independent statement in the pamphlet*," and in effect to say that if the statement so taken bodily from its surroundings was not libelous, it made up no part of plaintiff's cause of action. The defendant in his attempted justification or mitigation made no effort to indicate any such procedure and his answer is so drawn that the court could not intelligently do so and at the same time preserve the plaintiff's rights to have the relation of the statements to each other go to the jury. Upon the trial the only separation attempted by appellant was to swear different witnesses as to different and distinct statements which it was claimed plaintiff had made about himself, along the line of the evidence as given by the appellant. The court charged the jury fully and fairly. The article was before them; they were the judges of the facts, their application and relation to each other. Upon a trial of an indictment for libel the jury are the judges of both the law and the fact. (Code Crim. Proc. § 418.) The same procedure, viz., separating statements, was sought in *Morrison v. Smith* (177 N. Y. 368). The court says: "The question is a clean cut one, which we must determine, and it is whether, because the plaintiff has, by innuendo, put a meaning upon the language, she is bound by it and, however *libelous* the language *standing alone*, she must fail in her action, if that meaning is not supported by the language, or by proof. I am not inclined to concur in so restricted a view of the plaintiff's position and I am not aware of any decision of this court compelling it." The libel, the whole libel, is part of the complaint and detached statements cannot be set apart to destroy the connection of the whole. Appellant urges that no malice was shown. The whole publication reeks with malice and the evidence of plaintiff leaves no chance for a mistake in its character. He says the verdict is excessive. No, it is moderate. He says the plaintiff did not successfully bear the burden of proof. Added to the evidence given by plaintiff in reply to what defendant claimed he, plaintiff, said of himself,

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we have the fact that common sense is some times a force in any balance, and considering the position which plaintiff occupied, the knowledge that the jurors must have had of him, and his standing in the community, the jurors undoubtedly reached the conclusion, and I think rightly so, that such a man would not say such things of himself. It is evident that plaintiff through his paper criticised acts of the inhabitants, committed in public, when they were against law and order and not for the best interest of that community. From the records and from the lips of such of those criticised as went upon the stand, the truth of such criticism is in a large degree maintained. The judgment is so obviously just that any technical error should not disturb it. (Code Civ. Proc. § 1317.)

The judgment should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

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JOSEPHINE CARBONELLI, Respondent, v. CITY OF AMSTERDAM,  
Appellant.

Third Department, July 7, 1921.

**Municipal corporations — special and local assessments — statute (Laws of 1888, chap. 131) by which city of Amsterdam acquired bridge required it to keep property in repair — cost of sidewalk built on said bridge property cannot be assessed against abutting owner — Laws of 1911, chapter 242, relating to said city, saving clause applied — rule of practical construction applied.**

- Under chapter 131 of the Laws of 1888 the village of Port Jackson was
- annexed to the city of Amsterdam, and by the same act it was provided that the bridge between the two places should be under the charge and control of the common council of the city of Amsterdam, and that it should be the duty of the council to keep the same in repair at the expense of the city, to be levied and collected as other taxes are levied and collected for like purposes. In an action to recover back an assessment levied against the plaintiff's property, which abutted the bridge approach, for the cost of the construction of a sidewalk on the bridge property taken over as aforesaid, *held*, that by virtue of the saving clause in chapter 242 of the Laws of 1911, an act amending, consolidating and revising

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the several acts relative to the city of Amsterdam, the cost of the construction of said sidewalk could not be assessed against the abutting landowner.

Furthermore, the potency of said saving clause has been repeatedly recognized and confirmed by the city since the enactment of the statute and the rule of practical construction applies.

APPEAL by the defendant, City of Amsterdam, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Montgomery on the 24th day of January, 1921, upon the decision of the court rendered after a trial at Chambers, a jury having been waived.

*Ambrose P. Fitz-James*, for the appellant.

*J. H. Dealy*, for the respondent.

KILEY, J.:

The plaintiff by ample evidence sustained all of the allegations of her complaint upon the trial of this action, viz.: That by chapter 123 of the Laws of 1813 the Amsterdam Bridge Company was incorporated; that the purpose was to build a bridge over the Mohawk river between the towns of Amsterdam and Florida in the county of Montgomery, and said corporation was authorized and empowered to purchase or condemn lands necessary for the construction of said bridge and the approaches thereto. The said corporation as a source of revenue was authorized to construct a tollgate and house on said bridge or its approach, and to charge and collect fares and tolls for crossing the same; said structure was to be kept in repair by said corporation, and in default thereof the whole should revert to the original owners. By chapter 77 of the Laws of 1820-21 the Legislature in 1821 amended and altered generally the charter of said corporation, and extended its corporate life. The corporation did all that was required of it under its charter. In 1864 the village of Amsterdam was at one end of said bridge and the village of Port Jackson at the other end. By chapter 352 of the Laws of 1864 the said villages of Amsterdam and Port Jackson were author-



ized and required to purchase from said bridge company its property for the sum of \$23,000; that thereafter the title to said bridge property should be in the towns of Amsterdam and Florida, and it was provided that the trustees of said villages at the expense of said towns should keep said property in repair, assessing the expense thereof against the property of said towns. This was done. In 1885 the city of Amsterdam was incorporated and as to this bridge succeeded to the rights and liabilities of the village and town of Amsterdam (Laws of 1885, chap. 131, § 103); in 1888 Port Jackson was annexed to the city of Amsterdam by chapter 131 of the Laws of 1888. By this last act the defendant acquired all of the bridge property and succeeded to all of the rights and liabilities of the village and town of Amsterdam and the village of Port Jackson and town of Florida. That act (amdg. City Charter, § 103) provided with reference to said bridge as follows: "The common council of the city of Amsterdam shall have charge and control of the bridge over the Mohawk river, and it shall be their duty to keep the same in repair, at the expense of the city of Amsterdam, to be levied and collected as other taxes are levied and collected for like purpose." This is the last enactment of the State Legislature we find directly referring to the bridge in question. Chapter 242 of the Laws of 1911 is entitled: "An act to amend, consolidate and revise the several acts relative to the city of Amsterdam." By section 1 the act shall be known as the Amsterdam City Charter. The 2d section of said act, entitled "corporate powers," subdivision 6, reads: "To have and exercise all the rights, privileges, *functions* and *powers* now prescribed and exercised by it under existing or subsequent laws and not inconsistent with the provisions of this act." Section 160 of said act, entitled "repeal," refers to the acts consolidated, revised, etc., and provides: "but such repeal shall not revive any act or part thereof heretofore repealed, *nor affect any act done, right vested or established* \* \* \*. Nothing herein contained shall be construed so as to *destroy, impair or take away* any property vested or *any right or remedy acquired* by or under *any act hereby repealed.*" The Mohawk river passes through said city in an easterly and westerly direction; it is crossed by a bridge which is approached from the north and

the south on a street designated and maintained by said city as Bridge street. This bridge is approached from the south by a high embankment for hundreds of feet back from the bridge. This was constructed by the original bridge company, incorporated under the Laws of 1813 (*supra*), as a part of that enterprise and bridge. The surface of this approach is twenty feet above the land level at the bridge and slopes back until it merges with the highway or street at a grade level with the natural surface of the ground in that locality. The plaintiff purchased the vacant lot east of said approach and south of the bridge, her lot being bounded on the west by Bridge street. She built a building upon a foundation constructed by her on her own land and independent of the wall of the approach, which approaching wall tapered from its extreme east line upward toward the level of the approach. Between her building and the east line of the approach, and as a part of said approach, the city built a foundation and laid a sidewalk. It appears from the evidence that the sidewalk and foundation aforesaid became out of repair or insufficient for the growth and advancement of the city, and in 1917 the common council of the appellant city built a new walk along and in front of plaintiff's property, but on the city property taken over as aforesaid, and taken over under the conditions above set forth, and assessed the cost against the plaintiff's property. This action was taken under the provisions of the law of 1911 (*supra*). To avoid a sale of her property the plaintiff paid the amount assessed against her, but paid it under protest, thus saving her rights for any future move that she might be advised was available to her. She sued the city and was successful; the city appealed. The city justifies its action by relying on the law of 1911 (*supra*). If there was no other law involved, its position would be impregnable; but we have seen that this same law saves any and all rights theretofore existing under any statute theretofore enacted and under which such rights had been created. The potency of this saving clause, section 160, in the statute of 1911 aforesaid, has been repeatedly recognized and confirmed by the city since said enactment. In 1913, 1914 and 1917 such instances occur, and this plaintiff is the only one and her case is the only exception to the general rule followed

since 1864. These acts have been uniform and the rule of practical construction applies. (*Mayor, etc., v. Starin*, 106 N. Y. 1; *Power v. Village of Athens*, 99 id. 592.) That the approaches are part of the bridge has been settled in this department. (*Edwards v. Ford*, 22 App. Div. 277.) There are many decisions in this State to the same effect. The judgment should be affirmed, with costs.

Judgment unanimously affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. GORHAM  
MANUFACTURING COMPANY, Relator, v. STATE TAX COM-  
MISSION, Respondent.

Third Department, July 7, 1921.

**Taxation — mortgage tax — determination by State Tax Commission of value of long term leases — Commission not bound by value placed thereon by mortgagor — opinion evidence, cost of property and improvements thereon may be considered — books of mortgagor amount to admission of value of lease.**

The State Tax Commission in proceeding under section 260 of the Tax Law to determine the value of long term leases for the purpose of fixing the mortgage tax thereon is not bound to accept the opinions of experts of the mortgagor as conclusive.

Opinion evidence, the cost of the property and the improvements placed thereon by the mortgagor are all elements that may be considered by the Commission in determining the actual or market value of the leases.

The Commission in adopting as the value of the leases the cost of the improvements, less depreciation, that being the same amount at which at the time of its determination such value was represented on the books of the relator, did not act erroneously in arriving at its conclusion as to the actual or market value of the leases.

Furthermore, the books of the relator were a standing admission by it that the value of the leases was precisely that which the Commission fixed as their value.

CERTIORARI issued out of the Supreme Court and attested on the 23d day of July, 1920, directed to the State Tax Commission, commanding them to certify and return to the office

of the clerk of the county of Albany all and singular their proceedings had relating to the determination and apportionment of the mortgage tax payable by the relator.

*Olney & Comstock* [Albert E. Maves and Robert C. Beatty of counsel], for the relator.

*Charles D. Newton, Attorney-General* [James S. Y. Ivins of counsel], for the respondent.

COCHRANE, J.:

Under a mortgage executed by the relator covering property within and without the State and recorded in the office of the register of the county of New York on March 6, 1918, it became the duty of the State Tax Commission, as provided by section 260 of the Tax Law (added by Laws of 1916, chap. 335, as amd. by Laws of 1917, chap. 72; since amd. by Laws of 1918, chap. 204), to determine separately the values of the property situated respectively within and without the State. The relator submitted affidavits of experts stating their opinions as to such values. The Commission accepted those opinions as to the value of the property without the State but refused to accept them as to the value of the property within the State. It is contended by the relator that in such refusal the Commission was in error.

The property within the State consists of leases giving to the relator the option to continue them for many years, in some instances at least for fifty or sixty years. The relator made extensive improvements on the leased property for the purpose of making it peculiarly valuable in relation to its business which improvements at the termination of the leases will revert to the fee owners. It also carried on its books as the value of such leases the cost of such improvements reduced from time to time by suitable allowances for depreciation. The Commission adopted as the value of the leases the cost of the improvements less depreciation being the same amount at which at the time of its determination such value was represented on the books of the relator.

The true subject of the inquiry was the actual or market value of the leases. (*People ex rel. Metropolitan Street R.*

*Co. v. Barker*, 121 App. Div. 661; *affd.*, on opinion below, 200 N. Y. 509; *Matter of City of New York [Delancey Street]*, 120 App. Div. 700; *People ex rel. Delaware & Hudson Co. v. Feitner*, 61 id. 129; *affd.*, 171 N. Y. 641.) In establishing such value the opinion evidence submitted by the relator was competent but inconclusive. The cost of property as a general rule is also competent but inconclusive evidence. The weight and value of the evidence was exclusively for the consideration of the Commission. It determined that the affidavits of the relator were unsatisfactory and unreliable. There can be no question that the improvements to the leased property made by the relator increased its value and was proper evidence for the consideration of the Commission on the theory that what one pays for property is some evidence of its value. The cost of the improvements was not paid to the owners but it correspondingly enhanced the value of the leases and was an indication of what the relator deemed the increased value to be. The Commission did not ignore or disregard the evidence of the relator but weighing it in connection with what was equivalent to the cost price of the property fixed the actual or market value with reference to all of the evidence. From the cost price it made deduction for depreciation. Furthermore, the books of the relator were a standing admission by it that the value of the leases was precisely that which the Commission fixed as their value. Certainly the Commission might have fixed the value at a less amount, but it was a plain question of fact and no principle was violated by the Commission in arriving at its conclusion as to the actual or market value of the leases.

The determination should be confirmed, with fifty dollars costs and disbursements.

Determination unanimously confirmed, with fifty dollars costs and disbursements.

MARY HALLENBECK, Respondent, v. S. WANDER & SONS'  
CHEMICAL COMPANY, INC., Appellant.

JOHN F. HALLENBECK, Respondent, v. S. WANDER & SONS'  
CHEMICAL COMPANY, INC., Appellant.

Third Department, July 7, 1921.

**Negligence — action by servant of purchaser of can of chlorinated lime to recover from manufacturer for injuries received from explosion and action by husband for expense and loss of services — manufacturer liable — evidence that can came from defendant — admissibility in evidence of letter written by defendant after accident that new device had been invented to prevent explosion — judgment by Appellate Division on merits by virtue of Code of Civil Procedure, § 1317.**

In an action by a servant of a person who purchased a can of chlorinated lime from a retail druggist, to recover from the manufacturer thereof for injuries caused by the explosion of the can while it was being opened, which was tried with an action by the husband for expense and loss of services, *held*, that there was evidence that the material used in filling the can was dangerous and liable to explode where the gas could not escape, and that the finding of the jury that the can of lime in question was manufactured or put up by the defendant was sustained.

A letter written by the defendant to the druggist after the accident in which the defendant stated, "we have invented a disc of some kind that is now being put in on all cans which will prevent the possibility of any explosion in the future," was competent as some evidence that the defendant was the packer and distributor of the can in question; and, *it seems*, that said letter was also competent to show that better, safer and more practicable devices than those used were available to the defendant and that, therefore, it was not subject to the objection that it showed a changed condition after the accident.

Moreover, even if said letter was not entirely competent it was so near so that the Appellate Division, the judgments being right on the merits, will affirm the same under section 1317 of the Code of Civil Procedure.

APPEAL in the first entitled action by the defendant, S. Wander & Sons' Chemical Company, Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Greene on the 18th day of November, 1920, on the verdict of a jury for \$3,500, and also from an order entered in said clerk's office on the 20th

day of November, 1920, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

Appeal in the second entitled action by the defendant, S. Wander & Sons' Chemical Company, Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Greene on the 18th day of November, 1920, on the verdict of a jury for \$200, and also from an order entered in said clerk's office on the 20th day of November, 1920, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*Robert H. Woody* [*Norman G. Hewitt* of counsel], for the appellant.

*Herbert F. Roy*, for the respondents.

KILEY, J.:

On January 30, 1919, John C. McClure, a druggist located at Coxsackie, N. Y., purchased of the Gibson-Snow Company of Albany, N. Y., twelve cans of chlorinated lime. On July 8, 1919, he sold to a Mrs. Tompkins a can of this chlorinated lime for use in her house. At that time he had three or four cans of the dozen he had purchased of the Gibson-Snow Company left upon his shelves. This can was stamped the "triangle" brand, and at the time he purchased the shipment in January, 1919, the defendants were the sole packers and distributors of that particular brand. Previous to 1917, the druggist had purchased the same brand (triangle) of the Mendleson Company. On July 11, 1919, the plaintiff, who was a servant in the household of Mrs. Tompkins, attempted to open the can; it exploded and caused the injuries complained of here. Her husband's action, tried herewith, was for expense and loss of service. The plaintiffs had a verdict in each case. The defendant did not offer any evidence, but depends on exceptions to reverse the verdicts. The theory upon which the action is maintained was announced in *Thomas v. Winchester* (6 N. Y. 397) and followed down through the book ages, until it was again expressly affirmed in *MacPherson v. Buick Motor Co.* (217 N. Y. 382). Appellant says, even if the rule stated in the above cases still obtains,

there was no proof that this can contained dangerous material. There was evidence that material used in filling such cans and with this particular brand was dangerous and liable to explode where the gas could not escape. As for this particular can, they had the can and the explosion took place. The danger was manifest, the extent of damage done fairly well measured the danger under conditions existing, under circumstances detailed by the chemist upon the stand. The can was air tight, the pressure of the gas confined could reach thirty pounds at its peak, enough to blow off the top of a can on the least provocation. It is further urged on the part of the appellant that this can was not traced to stock sold by the defendant. Without going into detail to any great extent, it does appear that the material becomes inert by age, and in much shorter time than that elapsing between 1917 and July, 1919. The druggist purchased all of this brand of the Gibson-Snow Company after 1917, and that firm purchased all of its stock of defendant during the like period. There is evidence to sustain the finding of the jury that this particular can came from defendant. There is only one question raised upon the trial of this case that casts any doubt of the right to affirm these judgments, that is the reception of a letter written on July 16, 1919, to the druggist at Coxsackie, in reply to a letter that the druggist had written the Gibson-Snow Company. This letter was competent so far as its contents indicated that the defendant was the packer and distributor of the substance that exploded. In addition the letter contained information that it had invented and was putting on all cans a disc that prevented the possibility of an explosion. The reception of the letter in evidence was objected to and objection overruled. The objection was taken generally and then specifically to the latter part of the letter, as showing a changed condition after the accident which was prejudicial to the defendant. The disc so invented by defendant was also put in evidence over defendant's objection. We are familiar with the rule contended for by the appellant, viz., that you cannot show changes made after an accident by the one charged with negligence as an admission that such change was needed and should have been made before the accident occurred, and if the changes had been made the



accident would not have occurred. If such is the effect of the admission of the letter and disc in evidence, the judgment must be reversed. As to the letter, it was competent for the purpose for which it was offered, viz., as some evidence that the defendant was the packer and distributor of the can in question. The respondents find authority for its reception in evidence in *Dutchess Company v. Harding* (49 N. Y. 321), distinguished in *Flood v. Mitchell* (68 id. 512). The attention of the court was specifically called to the portion of the letter which defendant deemed objectionable by the objection taken, and if there is no other light in which the letter may be considered competent, it is questionable if 49 New York (*supra*) can save the situation. (See *People v. Rose*, 52 Hun, 33, and cases therein cited.) I feel that the judgments are right upon the merits, and that every reasonable intendment should be pursued in an effort to uphold them. To that end another line of reasoning may be properly invoked. The evidence of the chemist shows that for some time prior to January, 1919, there had been sold upon the market chlorinated lime in containers with cardboard sides covered with paraffin, and that such containers were not air tight and permitted the excess of gas generated to escape, and thus prevent explosion; in fact no case of such containers exploding is recorded, while many of the metal cans had exploded, and where damage occurred, two at least involving this defendant in litigation. (*Stellwagen v. Wander & Sons' Chemical Co., Inc.*, 192 App. Div. 943; *Groves v. Wander & Sons' Chemical Co., Inc.*, Id. 948.) The plaintiff in all negligence cases may show that better, safer and more practicable devices than those used were available to the defendant. While the cases hold that defendant is not bound to use the best-known appliances (*Harley v. B. C. M. Co.*, 142 N. Y. 31), it has always been a question for the jury whether out of such as were available he used such of them as were reasonably fit and safe. Applying that rule here, we have this state of facts: On July 16, 1919, five days after the accident, including the day the letter was written, the defendant said in the letter to which this objection was taken, "we have [past tense] invented a disc of some kind that is now being put in on all cans which will prevent the possibility of any explosion in the future." It will be recalled

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that the chemist in his testimony described such a disc and its safety properties. So far as the record discloses, it was exactly this kind of a disc. The defendant does not say we are going to invent, but that it had invented a disc and it was then put out upon the market. It must be presumed that it had been out for some time. Why was it not competent to show all devices in use that were out before the accident happened? This is close, but if it is not entirely competent it is so near so that we are called upon to apply the rule laid down in section 1317 of the Code of Civil Procedure, viz., "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." This defendant knew when the disc was put upon the market. Its silence gives rise to the presumption that it had existed before January, 1919, when this lot of chlorinated lime was purchased.

The judgments should be affirmed, with costs.

Judgments and orders unanimously affirmed, with costs.

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JAMES McCABE, Respondent, v. TURNER & BLANCHARD, INC.,  
Appellant.

Second Department, July 22, 1921.

**Ships and shipping — negligence — action at common law to recover for injuries received by longshoreman in falling through hatchway — accident caused by board covering hatchway tilting so that plaintiff fell through — defendant not bound to inspect ledge upon which board rested — charge should have limited issue to question whether foreman should have noticed shortness of board and then inspected ledge beneath.**

In an action by a longshoreman to recover damages for personal injuries received in falling through a hatchway in a boat, it appeared that the hatchway was covered by loose planks resting on a steel ledge; that the covering over the hatchway had been used during the day of the accident; that the accident was caused by the plaintiff stepping on one end of a plank covering the hatchway and the plank tilting so that he fell through the opening to the deck below; that the plank in question was from one

and one-half to two inches shorter than the opening; that the ledge on which it rested was bent down at an angle of about thirty degrees.

*Held*, that the defendant was under no duty towards the plaintiff to look to see whether the steel ledge beneath the boards was bent so that it would not support the plank, for the rule is that in the absence of some readily visible indication of a concealed defect there is no duty upon the stevedore master towards his longshoremen employees to look for a concealed defect.

Without proof that the beams and ledges upon which the plank rested are usually of such width that such a shortness in the plank would make it liable to tilt, no question of negligence was presented.

The charge of the court, even without request, in order to give a fair trial, should have limited the issue of negligence to the question whether or not, in the exercise of due care, defendant's foreman should have noticed that the plank did not come up flush to the combing, and whether or not, if he had noticed such condition, he should in the exercise of due care, have taken the plank up and examined beneath it.

KELLY, J., dissents, with memorandum.

APPEAL by the defendant, Turner & Blanchard, Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Richmond on the 14th day of January, 1921, upon the verdict of a jury for \$10,000, and also from an order, entered in said clerk's office on the same day, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*E. Clyde Sherwood* [*Clarence S. Zipp* and *Benjamin C. Loder* with him on the brief], for the appellant.

*Joseph B. Handy* [*Richard C. Bunzl* with him on the brief], for the respondent.

MILLS, J.:

This action was brought to recover damages for personal injuries which the plaintiff claimed to have sustained through the negligence of the defendant. There really was no substantial, or at the most very little, conflict in the evidence. That warranted the jury in finding the following facts:

The plaintiff, an experienced longshoreman, was an employee of the defendant, a corporation engaged in the stevedoring business, that is, in loading or unloading cargoes from vessels at New York city wharves. On May 19, 1920, the defendant, in the ordinary course of its business, was unloading a certain steamer at a Staten Island pier of a cargo consisting

of bundles of burlap, and plaintiff, in defendant's employ, with some twenty-three others of its employees, was at the work, which they began at about seven A. M., the accident happening at three P. M. The bundles or bales of burlap were being hoisted by appropriate tackle through a hatch in the main deck from the first deck below that. In that deck, directly below that hatch, there was a hatchway opening into a lower deck space, which hatchway was closed and did not have to be opened at all in the progress of the work. The accident happened at that lower hatchway. That was about nineteen feet long and fifteen feet wide. Its covering consisted of planks, about twenty in number, which were supported by three iron beams running crosswise under the opening, and by a steel ledge or shelf which ran about under the coaming of the hatch and projected about three inches. The planks were twenty to twenty-two inches wide, three inches thick, and about seven and one-half feet long. They were placed in two tiers running lengthwise so that each tier rested upon the middle beam and also upon the ledge or shelf, with the surface of the planks in position flush with the rest of the deck. The width of the beams does not appear to have been proven. Plaintiff was one of four of defendant's employees who worked upon that second deck attaching the lifting tackle to the bales of burlap. In doing that work they often had to step upon that hatch covering, the planks of which were not in any way nailed or bolted down. That they did without any mishap until about three P. M., when one of the planks, as the plaintiff stepped upon it near the coaming, tilted and he fell through the opening thus made down some thirty-five feet below, and was seriously injured. The plank immediately righted itself. Subsequent examination revealed the fact that the steel ledge upon which that end of the plank rested was bent downwards at an angle of about thirty degrees, and the fact that the plank which had so tilted was from one and one-half to two inches shorter than the full opening, and that its surface was more or less worn. Plaintiff and his companions had walked over that hatch covering continuously — "hundreds of times" — during the day up to that moment, and had noticed nothing about it to attract their attention. It had looked all right to them. Defendant's foremen had

made no special inspection of the covering further than to see that it was apparently in place. There was plenty of light there; and the hatch covering was clear, that is, without anything upon it.

Plaintiff's counsel tried the case upon the theory that the State statute, the Employers' Liability Act as contained in the Labor Law (Art. 14, as amd. by Laws of 1910, chap. 352),\* applied; but the trial justice in the end ruled to the contrary, and submitted the case as one at common law. Respondent's counsel here contends that that ruling was mistaken; but of course the case upon this appeal must be tested upon the theory upon which it was submitted. The charge instructed the jury that it was defendant's duty as master of plaintiff to carefully inspect that hatch covering before setting him at work over it, and that, if such an inspection would have discovered the defect which caused that accident, defendant stood charged with negligence—in other words, that in that event the issue of its negligence was proven. The charge, however, was entirely general and did not attempt to limit the application of the stated rule to the facts which the jury might find proven. Indeed, it left the entire matter open so that the jury might even have concluded that in the exercise of due care defendant's foremen should have taken up the planks and thus discovered the bent condition of the ledge; but no request was made to remove that possibility, that is, to take away from the jury that question. Defendant's counsel apparently tried the case upon the theory that defendant was under no duty of inspection of the ship or its appliances whatever.

Happily for the easy disposition by us of this appeal, the law governing it has very recently been definitely decided or at least stated by the Court of Appeals (231 N. Y. 178), in reviewing our recent decision in *Liverani v. Clark & Son* (191 App. Div. 337). The law as thus settled or stated is simply this—that in the absence of some readily visible indication of a concealed defect, *e. g.*, in that case exterior rusty condition of the ringbolt, here the shortness of the plank, there is no duty

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\* Now Employers' Liability Law (Consol. Laws, chap. 74; Laws of 1921, chap. 121).—[R.E.P.]

upon the stevedore master towards his longshoremen employees to look for a concealed defect. It clearly follows that this defendant was under no duty towards this plaintiff to look to see whether the steel ledge beneath the covering was bent so that it would not support the plank. That feature of the case should have been eliminated by an appropriate limitation in the charge; but defendant's experienced trial counsel made no such request. The only question of negligence which, if any, the evidence raised was through the somewhat indefinite testimony that the plank which tilted appeared after the accident to be some one and one-half to two inches short "to have it come up close to the coaming." The sole question of negligence in the case was whether or not, in the exercise of due care, defendant's foreman should have taken that plank up and investigated its supports, had he noticed its shortness. There was no evidence at all indicating that there would have been any danger of the plank tilting, short as it was, if the ledge at that point had not been so bent down.

My conclusions are (a) that, without proof that such beams and ledges are usually of such width that such a shortness in such a plank would make it liable to tilt, no question of negligence was presented; and (b) that the charge, even without a request, in order to give a fair trial, should have limited the issue of negligence to the question whether or not, in the exercise of due care, defendant's foreman should have, noticed that the plank did not come up flush to the coaming, and whether or not, if he had noticed its such condition, he should, in the exercise of due care, have taken the plank up and examined beneath it. Of course, if he should not have done the latter thing, his failure to notice the shortness was not a proximate cause of the accident. It may be noted in passing that there was no proof at all that such beams and ledges are usually so narrow that such a shortage would render a plank liable to tilt. The defendant attempted to prove the usual construction in that respect; but the evidence was excluded without its counsel excepting. In short, as the evidence stood, I think that there should have been a non-suit; and also that the charge was, in the respect above stated, entirely inadequate. Except for the indefiniteness of the evidence as above indicated, which may possibly be remedied

upon a new trial, I would recommend not only a reversal but a dismissal of the complaint.

Therefore, I advise that the judgment and order appealed from be reversed and a new trial granted, with costs to abide the event.

BLACKMAR, P. J., RICH and MANNING, JJ., concur; KELLY, J., reads for affirmance.

KELLY, J. (dissenting):

I am forced to dissent. While I am disposed to agree with Mr. Justice MILLS' criticism on the general nature of the charge in omitting to direct the attention of the jury to the particular defect claimed and whether its existence would be ascertained by reasonable inspection, still the defendant did not ask for specific instructions. I do not agree that as matter of law there was no duty on the master to examine the support for the planks. I think that in regard to the sufficiency and safety of the hatch cover of loose boards which was the floor upon which the men were put to work, a much greater degree of care was necessary than in the case of the "ringbolt" in *Liverani v. Clark & Son* (191 App. Div. 337; revd., 231 N. Y. 178), and, applying the law as laid down by the Court of Appeals in that case, to the facts here, the short plank was a readily visible indication of a defect.

I think a jury might say, in view of the importance of a secure floor, the planks in the hatch being laid loose, that reasonable care might require the foreman in charge to test the stability of the flooring. He made no such test, indeed it does not appear that he did anything. While it is true the men used this hatch cover as a floor previous to the accident without mishap, I think it would still be for the jury to say whether reasonable inspection would not have disclosed this defect in the support which with the short plank brought about the injury to the plaintiff. In a hatch cover such as this, the fact that one of the planks was one and one-half to two inches short was a serious defect if the planks were held up by a narrow flange beneath.

Judgment and order reversed and a new trial granted, with costs to abide the event.

In the Matter of the Petition of FRANCIS H. GILBERT, Respondent, to Prove the Last Will and Testament of HANNAH E. TAYLOR, Late of the County of Kings, Deceased.

ELIZABETH CHANDLER and Others, Appellants.

Second Department, July 22, 1921.

**Wills — testamentary capacity not shown — will executed through undue influence — instructions — general instructions not applied to facts of case insufficient — charge, though not excepted to, constituted error in fact.**

In proceedings to probate a will it appeared that the decedent, a colored woman, was, at the time of the execution of the will, entirely paralyzed upon her right side and was speechless and helpless, except for some minor movement upon her left side; that after she was stricken with paralysis a physician, a stranger to her, was called in and established communication with her whereby if she wished to answer a question in the affirmative she raised one finger of the left hand, blinked her eyes once and raised her left knee, and if she desired to answer in the negative she raised two fingers of her left hand, blinked her eyes twice and raised her knee twice; that the physician immediately interested himself in the question of her making a will; that the residuary legatee in the will, who was not a relative but who had aided the testatrix in some litigation; procured the attendance of her lawyer at her residence; that the lawyer and his assistant and the doctor, after dismissing several friends of the testatrix from her room, proceeded to ask the testatrix if she wished to make a will and if she desired to make bequests to certain persons named, a list of whom had been furnished by the residuary legatee; that by means of the signals prearranged by the doctor information was secured from the testatrix and the will prepared and executed; that the bulk of the testatrix's estate was left to the residuary legatee.

*Held*, on all the evidence, that the finding that the testatrix possessed testamentary capacity was against the weight of the evidence, at least in this, that the evidence did not warrant a finding that she was able, unaided by the suggestions of others, to recall the natural objects of her bounty or that she was so aided;

That the finding, which the conclusion of due execution implied, that she understood that the will cut off as beneficiaries certain institutions and her stepdaughter, was against the weight of the evidence, in that the evidence did not warrant the finding that she had them in mind;

That the finding that the will was not proven to have been executed through undue influence was against the weight of the evidence, in that the evidence indicated that the natural objects of her bounty were kept out of



her mind by the contrivance of the residuary legatee in preparing a list of possible beneficiaries.

The duty of a trial judge in instructing the jury is not discharged by simply giving to the jury an essay stating in language, however technically correct, the general principles of law without making any attempt to apply those principles to the facts of the particular case as the jury may find them proven.

The charge of the trial court was of the most general character and while it was not excepted to and, therefore, does not constitute error in law, it was so inept as to constitute substantial error in fact so as of itself to require a new trial.

APPEAL by Elizabeth Chandler and others from a decree of the Surrogate's Court of the county of Kings, entered in the office of said Surrogate's Court on the 18th day of November, 1920, admitting a certain paper writing to probate as the last will of Hannah E. Taylor, deceased,—said decree being based upon the verdict of a jury, which verdict answered in the affirmative two and in the negative the other of the three questions ordinarily submitted to a jury in such a contest, and also from an order, entered in said surrogate's office on the 10th day of November, 1920, denying appellants' motion to set aside the verdict and for a new trial made upon the minutes.

*Samuel F. Edmead*, for the appellants Elizabeth Chandler and Lottie Green.

*Francis P. Callahan*, special guardian for infant appellants.

*R. M. Cahoon* [*Frederick H. Chase* with him on the brief], for the respondent.

MILLS, J.:

The decedent, a colored woman, died in the borough of Brooklyn on July 10, 1919, at the age of over seventy years. Her exact age appears to have been unknown, but her apparent age was at least seventy. She left property, real and personal, of the value of about \$30,000. She was a widow with no child or relative nearer than nieces. Apparently somewhat late in life she married a widower with one child, a daughter, with whom she seems not to have harmonized. The husband predeceased her on December 9, 1917. They had made mutual wills, and by his will she acquired his entire estate,

which I understand from the statements of counsel upon the argument constituted the bulk of her estate at her death. The stepdaughter, evidently being grown and married, contested her father's will; but the contest resulted in the widow's favor, sustaining the will. It ended only a few months before her death, and Mr. Chase, hereinafter referred to, was her attorney throughout it, as he also was in another law suit which she had with a third party at about the same time. The paper propounded herein upon its face appears to have been executed on the 7th day of July, 1919, three days before her death. She was stricken with paralysis the early morning of July fourth preceding, being entirely paralyzed upon her right side; and she so remained, speechless and helpless, until her death; except for some minor movements upon her left side. The old family physician, Dr. Frederick M. Jacobs, a colored man, who had been the physician for her husband and earlier for some years the pastor of their church, was at once called in to attend her. He found her utterly paralyzed as above stated, and in a semi-conscious condition, so that he could get from her no sign of recognition. He saw her again on the fifth, and found her condition unimproved. Then, being obliged to be absent for a few days, he requested Dr. McCoy to attend her in his absence, and she died before he returned. It is not clear how Dr. Jacobs came to select Dr. McCoy, but there is nothing to indicate that Gilbert, hereinafter referred to, had anything to do with that. McCoy had been for several years an alienist, but in general private practice for a few years. Apparently, his selection to attend this woman was quite happy, at least from one point of view, for according to his testimony he very speedily solved the problem of communication with her, which her old physician had found insoluble. The paper was signed, as witnesses, by Mr. Chase, Mr. O'Dougherty, a lawyer assistant in Chase's office, and Dr. McCoy. All three were examined at length at the trial. Their version was the following, taken by me chiefly from the testimony of the doctor, which was corroborated by the other two, except in the particulars hereinafter designated.

Dr. McCoy was an entire stranger to her, and visited her first about noon on July fifth. He found her in bed and

paralyzed as above stated. Her condition then appeared to him to be hopeless. He proceeded forthwith to establish a system of communicating with her by directing her to answer his questions by raising one finger of the left hand, which she could move to some extent, for "yes," and two fingers for "no." Upon his first test she responded by raising the one finger, indicating that she understood. Then to make assurance doubly sure he instructed her to respond by doubling the signal, that is, not only raising the finger but by blinking her eyes once for the affirmative and twice for the negative. It may be pertinent to inquire why the double test, if the response to the first had been so prompt and complete. Having thus established his system of communication, the doctor, a perfect stranger to the woman and her affairs as he was, proceeded forthwith to ask her if she had made a will, and then, receiving from her the negative response by the raising of the two fingers and the double blinking of the eyes, he further asked, "Do you wish to make a will?" to which question she gave the instructed affirmative response. Here natural curiosity at least prompts the inquiry — what business of his was that? The only answer to this question is the doctor's statement that, when he arrived, one of the colored women with her told him that she had been going to make a will and had not made it. Who the woman was does not appear. At any event there is no suggestion that any request was made that the doctor, a perfect stranger, should precipitate himself as an actor into the matter. On the following day, at about noon, he returned and found her condition unchanged. At once he resumed the will question, but, apparently to make assurance trebly sure, he instructed her to add another sign to her response by lifting her left knee once for the affirmative and twice for the negative. Then he proceeded forthwith to put to her the same identical will questions which he had asked on the previous day, and he received from her the same responses, only they were given by the treble signs instead of the double ones. The doctor ends his testimony at that point with these laconic words, "That ended that visit." As to the next step in the *factum*, the doctor and Chase are somewhat at variance, and I proceed according to the latter's narrative. During the morning of the next day, July seventh,

Gilbert called Mr. Chase at his office upon the telephone, and told him that Dr. McCoy wanted him, Chase, to call him, the doctor, up; but somewhat strange to say Chase could not remember what Gilbert told him McCoy wanted to see him, the lawyer, for. Here it may well be noted that Chase and McCoy had had no previous acquaintance. Chase says that, having called McCoy up, he told him that Gilbert had asked him to do so, and that he, Chase, asked the doctor what he wanted; whereas the doctor says that Chase merely asked him if Mrs. Taylor was capable of making a will. The important point here is that it is plain that Gilbert was the prime mover in producing the *factum* of the will. At any rate Chase, with his assistant, about noon went to the doctor's office, and with him proceeded to Mrs. Taylor's house. There they met Gilbert outside, evidently waiting for them. They found in her bedroom some ten or twelve colored women and one or two colored men, evidently her old church friends, for she had been quite prominent and even an officer in the colored church. The three lost no time, but started in at once by ordering the entire company from the room, and for a wonder went so far in the effort to secure entire secrecy as to disconnect the telephone. Why all this, it may here be asked. It would seem, at least at first impression, that the aged woman in her half moribund condition needed, if ever, the aid and the presence of at least some of her old and trusted friends. Chase's explanation for that proceeding is that he wanted to secure against the possibility of any undue influence. Tastes differ, and I would have thought that the procedure taken was the very one likely to invite that charge. Then the doctor, with his previously designed and instructed tests, proceeded to ascertain if she knew Chase and his assistant; and to each inquiry she responded by giving the three-fold affirmative signal. Then he proceeded for the third time to put to her his two stereotyped will questions — had she made a will, and did she wish to make one — and received from her the double three-fold response to the first inquiry, and the single like response to the second. Then came the difficulty, and that was to ascertain her testamentary intentions; and somehow the three who were alone with her hit upon this method, namely, to procure from Gilbert a list of possible

or probable beneficiaries, and then to ask her as to each one, "Do you want to give him or her [naming] anything?" and if by the accepted signs she said "Yes," then to ask her how much by beginning with the suggestion of \$100 and asking her in succession for each ascending \$100 until she responded in the negative. Accordingly, Chase called Gilbert up into the hall outside the room, and got such a list from him. No effort was made to ask for any suggestion in that line or at all from any of the other numerous company of friends who had been ordered below. Here it may well be noted that Chase had been Gilbert's attorney for many years, and Chase had discussed with him and Mrs. Taylor the proposition of the will some time before. Thus equipped the three still alone with the woman resumed the task of will making. From the list so furnished by Gilbert they put to her as to each one named therein the question, "Do you wish to give to him or her [naming] anything?" To most of those named she gave the negative reply by the double treble signs; but as to three she gave the affirmative response by the single treble signs, although as to one of them, Mrs. Burch, she first gave the negative but later the affirmative. As to the three, she indicated by her repeated such responses the hundreds as follows: Mrs. Walker \$300, Mrs. Mattocks \$500, and Mrs. Burch \$400, or \$1,200 in all. Then the following question was put to her plump and square by Chase: "Do you wish the remainder of your estate to be left to Mr. Gilbert?" and she answered by raising the one finger, blinking the eyes once, and by raising the left knee. Then the assistant, having heard and seen it all, at once wrote out the will accordingly. Chase then read it over to her and asked her if it was all right, or if it was her last will and testament; and if she wanted the three to sign as witnesses, to all of which inquiries she separately replied by giving the affirmative signals; and then the doctor took her left hand in his own and with it made the cross, and the witnesses signed, and the action was complete and the will made, provided we so determine. I have taken pains to go over the various acts imputed to her at that time by the narrative, and find that she then in the course of the making of the will raised her finger 44 times, and blinked her eyes and raised her left knee each the same

number of times, making 132 different movements of parts of her body. Mr. Chase testified that some few days before, two or three weeks, she had talked with him in the presence of Gilbert about making her will; and in a different part of his testimony he said that she then told him that she intended to make Gilbert her residuary legatee, and did not intend to give her relatives anything.

It was proven by her old pastor and physician, and by others of her old friends, that she had told them that she intended to leave in her will bequests to the church of which she had long been an official and evidently a devout member, and also to the Old Folks Home, the Home for the Colored Aged, and the Young Women's Christian Association. In the making of the will no inquiry was addressed to her to ascertain if she wanted to leave anything to any of those institutions, nor were they at all called to her attention. While she had had the contest with her husband's daughter over his will, she had afterwards told several of her friends that she still meant to leave something to the daughter in her will, as her husband had wished her to do so. The daughter was in no way called to her attention during the making of the will. Evidently Gilbert's list did not contain the name of the daughter or of any of those institutions. It is perhaps a significant fact that Mr. Chase threw away or destroyed the list which Gilbert gave him. Gilbert was no relation of Mrs. Taylor, but was a cousin by marriage of one of her grand-nieces; but he had aided her in her litigations.

It will, I think, be conceded by any one that the case, even as thus presented for the proponent, was a most remarkable one — at least in all my experience at the bar and upon the bench I have never read of anything like it outside of fiction. The only precedent for such will making which has come to my attention is an incident given in Dumas' novel entitled "The Count of Monte Cristo," volume 2, chapter 59. In that, however, the notary conducting the proceeding first applied to the paralytic the test as to knowledge of property, and even required the evidences of property to be produced, and also there the making was by a single sign, the movement of the eyelids; whereas here the doctor and the lawyer presiding made no such test, and required from the semi-conscious

woman three successive bodily signals for each testamentary act therein, perhaps illustrating the truth of the maxim, "Truth is stranger than fiction." Here again we may inquire why the super-caution of the three signals.

For the contestants there was evidence, given by the former doctor, Jacobs, and by other old friends who visited her each day from the fourth to the tenth inclusive, that she was practically unconscious, unable to recognize them; and several of the old friends testified to her previous declarations of the said other testamentary intentions.

In that situation of the case it is plain that the jury needed to have in the charge not only a clear statement of the general rules established for determining the *factum* of a will, but also at least a precise and definite statement of the particular issues presented by the evidence in this particular and extraordinary case. A careful perusal of the charge reveals that, while it stated quite correctly those general rules, it made no reference whatever to the facts of this case. It dealt entirely with generalities and would be just as applicable to any other will contest as to this particular one. Thus, in instructing the jury as to testing her intelligence, that is, her state of mind when she made the will, the charge said that they might regard her "speech and conduct" at the time, as no doubt the learned surrogate had found it stated in several and perhaps many reported opinions of the highest court; although in this particular case all the evidence agreed that the testatrix was absolutely speechless. Later the reference to speech as a material factor was repeated.

The charge also was quite unsatisfactory in its dealing with the expert medical testimony. Its final summary upon that topic was, "If the question [meaning the hypothetical one] omitted to assume as true any fact which you shall find to have had existed in the person of the decedent and which you shall believe to have been a condition or symptom material to your conclusion as to her testamentary capacity when she signed the will, it will be your duty to disregard the physician's answer to that question;" but no attempt was made to point out to the jury what "conditions or symptoms" they should regard as material. Indeed they were instructed to disregard entirely such testimony if the hypothetical question which

elicited it omitted any single fact which they believed to be material. It was left to them to conjecture for themselves what proven fact was material. However, no exception was taken to any part of the charge, and no request clarifying or otherwise was made.

The charge properly defined the three well-known and established elements of testamentary capacity, viz., (a) intelligence or ability to keep in mind the property one has to dispose of; (b) ability to know or recall one's relations to the natural objects of one's bounty, that is, their natural claims upon him; and (c) the effect of the testamentary dispositions being made, for example that they will give the property thus and so to those specified, and incidentally cut off those not specified.

As to the issue of undue influence, the charge also was correct in its general terms, both as to the burden of proof being upon the contestants and as to the general fact necessary to be established in order to prove the allegation, and even that the proof may be entirely circumstantial; but it utterly failed in any way to discuss the facts in evidence bearing upon that problem. For instance, it in no way referred to the significant fact of Gilbert's own participation in the *factum* of the will.

Aside from the general extraordinary situation respecting the making of this alleged will, four things appear to me to be notable. The *first* is that there was no attempt whatever made to test Mrs. Taylor's intelligence as to the first of the specifications above stated, viz., her knowledge of her property even generally. The *second* is that several of the natural beneficiaries according to her often declared intentions, namely, the church and the other mentioned institutions and her husband's daughter, were not in any way suggested to her. Estranged as she evidently was from her own relatives, who were all quite distant in degree, or slightly regardful of them so that, by the appropriate signs, she declared that she did not wish to give anything to any of them, nothing could have been more natural than that she should wish to give something to the church to which she was, after the manner of her race, greatly devoted and of which she and her husband before her had been officials, and that she should wish to give something



to her husband's daughter in accordance with his request to her, yet in no manner was either brought to her attention, when all three persons present recognized that the only possible method of testing her state of mind was by specific suggestion. In the fiction case above referred to, each natural object of the testator's bounty was, at the very making of the will, specifically called to his attention; and, indeed, each such person was permitted to be present and in person to urge upon him his claims to his bounty. Possibly if that precedent had been fully followed in this case, this appeal might be free from the difficulties which we realize in dealing with it. In the *third* place, after very brief mention of other possible beneficiaries, Gilbert's name was suggested by Chase with this reminder, "As you stated to me in my office," namely, "Do you wish to make Mr. Gilbert your residuary legatee as you have stated—as you stated to me in my office?" As to him there was no testing by the successive hundreds as was the procedure with each of the others named; but at once the suggestion was made of the whole for him, viz.: "Do you wish to make Mr. Gilbert your residuary legatee?" The *fourth* and last is that neither Chase nor Gilbert, the active agents in the matter, both of whom, or at least Gilbert, must have known well the general situation, consulted any one of the dozen or more of Mrs. Taylor's old friends, who were in the house, as to any other possible or probable beneficiaries to be suggested to her. Mrs. Moore and Mrs. Waddell, her intimates for many years in church affiliations and otherwise, were both below in the house, and had each had from her lips declarations of her other such testamentary intentions. Doubtless if either had been consulted she would have suggested those institutions and the stepdaughter.

I find myself, therefore, compelled to conclude that the finding that she possessed testamentary capacity was against the weight of the evidence, at least in this, that the evidence did not warrant a finding that she was able, unaided by the suggestions of others, to recall the natural objects of her bounty, or that she was so aided. In other words, the weight of the evidence indicates that the suggestions made did not serve to recall to her mind those objects fully and fairly.

I further conclude that the finding, which the conclusion of due execution implied, that she understood that the will cut off as beneficiaries those institutions and her stepdaughter, was against the weight of the evidence, in that the evidence did not warrant the finding that she had them in mind.

I also conclude that the finding that the will was not proven to have been executed through undue influence was against the weight of the evidence, in that the evidence indicated that those natural objects of her bounty were kept out of her mind by the contrivance of Gilbert in preparing his list. Undue influence may be established by circumstantial proof, and to my mind the circumstances proven point unerringly to intentional suppression upon his part. He had aided her in her litigations, and in all reasonable probability knew well all her testamentary intentions as to those institutions and her stepdaughter. Certainly he had the means at immediate hand for ascertaining those intentions from her friends present in the house. That he made no effort to do so is evident from the fact that the entire business of the list was concluded between Chase and him in the hall outside the door of Mrs. Taylor's room at one meeting.

It would be a plain miscarriage of justice if a will secured from a dying person in such manner should be sustained. Moreover, at the trial had the jury were utterly unaided by the charge in dealing with the most extraordinary facts presented by the proofs, and they could have gained from it no idea of their true import or weight as affecting the issues involved. At a jury trial the duty of the judge is not at all discharged by simply giving to the jury an essay stating in language however technically correct the general principles of the kind of action being tried, such as contract, conversion, personal injury, or what not, without making the least attempt to apply those principles to the facts of the particular case as the jury may find them proven. Such a charge can serve only to confuse a jury, or at the best to make their verdict dependent upon the chance of their sense of natural justice in the case. The charge here was of that most general character. It was not excepted to, and, therefore, does not constitute error in law; but it was so inept as, in my judgment at least, to constitute substantial error in fact so as of itself

to require a new trial. What was recently said upon this point by the Court of Appeals in *People v. Odell* (230 N. Y. 481, 488, 494) is equally applicable here, viz.: "The trial judge should not as a rule limit himself to stating good set terms of law culled from the codes and the reports. Jurors need not legal definitions merely. They require proper instructions as to the method of applying such definitions after reaching their conclusions on the facts" (p. 488); and "The charge is intended to aid a jury of laymen in the decision of the material issues of a case. It is to point out what are the kind of facts, among a great number before them, some material and some immaterial, that bear upon these issues. It is to assist them in reaching a just result; to aid in securing a fair and impartial trial. None of these objects is attained by a mere statement of legal definitions. Some idea, at least, must be given of their bearing upon the concrete case at issue." (p. 494).

Therefore, I advise that the decree appealed from be reversed, and a new trial ordered, with costs to abide the event.

BLACKMAR, P. J., RICH, KELLY and MANNING, JJ., concur.

Decree of the Surrogate's Court of Kings county reversed, and a new trial ordered in said court, with costs to abide the event.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
JOHN ROMANELLI, Appellant.

Second Department, July 22, 1921.

**Crimes — grand larceny — conspiracy between bailor and third person to sell property — defendant by procuring purchaser and participating in delivery became co-conspirator — larceny not complete until sale actually made — defendant not guilty of receiving stolen property.**

On a prosecution for grand larceny in the first degree it appeared that a truckman and a third person entered into a conspiracy to divert certain drums of wood alcohol from shipment and to sell the same; that the alcohol was stored in the truckman's garage awaiting a purchaser from the conspirators; that thereafter the defendant agreed to and did secure a purchaser for the alcohol; that the drums of alcohol were taken to

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defendant's garage, the alcohol siphoned from the drums, and water substituted in its place.

*Held*, that the larceny was not complete until bulk had been broken, that is, the drums pierced and the contents siphoned into the barrels furnished by the purchaser, and in that act defendant participated and became a co-conspirator and guilty of the crime of larceny, as if he had originally planned the theft.

Until the alcohol was taken from the drums there was no actual conversion of the property sufficient to constitute larceny; a mere unexecuted contract by a bailee for the sale of property, or an offer of sale, does not constitute such a conversion.

The facts would not warrant the conviction of the defendant of the crime of receiving stolen property.

APPEAL by the defendant, John Romanelli, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 26th day of November, 1920, convicting him of the crime of grand larceny in the first degree.

*Luke D. Stapleton* [*Isaac V. Schavrien* with him on the brief], for the appellant.

*Harry G. Anderson*, Assistant District Attorney [*Harry E. Lewis*, District Attorney, and *Ralph E. Hemstreet*, Assistant District Attorney, with him on the brief], for the respondent.

RICH, J.:

On the 9th day of December, 1919, ten drums of wood alcohol, the property of the Delta Chemical Company of Wells, Mich., were delivered to one Woller, a truckman, for transfer to a steamship, and pending the arrival of the ship at the port of New York they were stored in his garage. It seems that Woller and one D'Ambrosio, another truckman, who stored his truck in Woller's garage, had entered into a conspiracy to steal the first consignment of alcohol he should receive for shipment. D'Ambrosio was informed of the receipt of the alcohol and commissioned by Woller to find a purchaser for it. The following evening D'Ambrosio appeared at the coffee house conducted by one Telesi and located at No. 285 Third avenue in the borough of Brooklyn and displayed a sample of the alcohol and offered it for sale.

At the coffee house that evening, D'Ambrosio met the defendant Romanelli, who engaged to procure a purchaser for the alcohol. The defendant was successful in his part of the

enterprise and procured a purchaser in the person of one Lizenziata, who on December 18, 1919, at defendant's shop, agreed to purchase the alcohol and paid a deposit of \$2,000 to defendant. The defendant thereupon informed D'Ambrosio that a purchaser had been procured. On the following morning when D'Ambrosio arrived at Woller's garage for the purpose of having the alcohol delivered, he discovered that it had been sent to New York for shipment, Woller having by that time despaired of obtaining a purchaser, and he thereupon proceeded to New York, intercepted the alcohol and caused it to be returned to Woller's garage, from which it was removed to defendant's garage on December 20, 1919, where the alcohol was siphoned from the drums, and water substituted in its place. There is satisfactory evidence that the defendant assisted in the operation and that the purchase price of \$23,500 was paid to him.

It is urged by the appellant that an appropriation of the alcohol was consummated when Woller with D'Ambrosio on December 10, 1919, agreed to steal it, all of which occurred before defendant was known in the transaction, and in any event, if the wrongful appropriation was not earlier consummated, the property was misappropriated when it was diverted from its lawful course. In other words, that the defendant should not have been convicted of grand larceny, but, if anything, of receiving stolen property.

The fallacy in this reasoning lies in the fact that the larceny was not complete at the time the drums were diverted from the steamship pier. The faithless bailee, Woller, could have recanted at any time prior to the actual sale of the alcohol. A mere unexecuted contract by a bailee for the sale of the property, or an offer of sale, does not constitute a conversion. The conversion must be actual to constitute larceny. (*Regina v. Brooks*, 8 C. & P. 295; 34 E. C. L. 743; *Anonymous*, 1 Ohio Dec. 279; 6 West. L. J. 566.) It follows that the larceny was not complete until bulk had been broken, viz., the drums pierced and the contents siphoned into the barrels furnished by the purchaser. In this, as I have said, there is evidence that the defendant participated, and by that participation he became a co-conspirator as though he had originally planned the theft with Woller and D'Ambrosio.

While the authorities are not agreed as to whether one who assists in the commission of a larceny, although not guilty of the actual taking and carrying away, can be convicted of receiving the stolen property, the facts in the instant case would not warrant such a conviction.

Some cases hold that one who assists in the larceny and who could be convicted as a principal, although not guilty of the actual taking, cannot be guilty of receiving the stolen property. (*Regina v. Kelly*, 2 C. & K. 379; 61 E. C. L. 378; *Regina v. Perkins*, 5 Cox C. C. 554; *State v. Honig*, 9 Mo. App. 298; *affd.*, 78 Mo. 249; *People v. Brien*, 53 Hun, 496.) Other cases seem to support the rule that a prosecution for receiving stolen property may be maintained against one who was present, aiding in the commission of the larceny, and receiving the property from the principal, for the reason that the receiving of the property is subsequent to the larceny in fact and not a part of it. (*Smith v. State*, 59 Ohio St. 350; *Jenkins v. State*, 62 Wis. 49; 21 N. W. Rep. 232; *People v. Rivello*, 39 App. Div. 454.) The *Rivello Case* (*supra*), however, may be distinguished from the *Brien Case* (*supra*) by the fact that in the former case the larceny was complete without any aid from the defendant, while in the latter case the acts of the defendant were a part of the larceny and necessary to its consummation. The same conclusion follows in the instant case, for the larceny by the bailee Woller was not complete until an actual conversion, which implies an actual sale and not an unexecuted contract of sale. In this stage of the larceny the defendant participated, his participation was essential to its success, without which the sale might not have been consummated. As I have said, the bailee might have recanted, in fact, evidently despairing of finding a purchaser for the alcohol, he had already started it on its lawful course for shipment, when through defendant's active intervention in procuring a purchaser for the alcohol, it was diverted.

It, therefore, follows that the judgment of conviction must be affirmed.

BLACKMAR, P. J., MILLS, PUTNAM and JAYCOX, JJ., concur.

Judgment of conviction affirmed.

## MORTIMER A. HARRISON, Respondent, v. HEBREW COMMUNITY OF BOROUGH PARK, Appellant.

Second Department, July 22, 1921.

**Contracts**—action to recover damages for breach of contract by defendant to bury plaintiff's father—evidence—evidence inadmissible as to whether defendant made profit by selling graves—question of performance by defendant should have been submitted to jury—measure of damages.

In an action to recover damages for an alleged breach of contract by defendant to furnish and supply everything necessary for a proper and fitting burial and funeral for plaintiff's father in accordance with the rites of the defendant, it appeared that the defendant owned the cemetery which was under the control of another cemetery corporation; that the plaintiff not being satisfied with the grave offered bought another grave from the defendant; that the defendant conducted the funeral services up to the cemetery gates where admission was refused by the other corporation on the ground that it had not been notified in time as to opening the grave, and that the plaintiff refused defendant's offer to have the body placed in a vault till the following day and then buried, but secured another burial permit and himself arranged for and had burial services conducted on the following day and his father buried in another cemetery.

*Held*, that it was error for the court to admit testimony, over the objection of the defendant, as to the defendant's desire to make money out of selling burial plots.

The trial court should have submitted the question to the jury whether the defendant did not in fact perform its obligations under the rules and regulations governing the funerals of its members as required by the contract in question.

If there was a breach of the contract by the defendant the measure of plaintiff's damages was the expense of keeping the body over night and for a coach or carriage for the family on the succeeding day, in accordance with the by-laws of the defendant, and the damages should not include the total expense paid by the plaintiff in conducting the funeral services for his father on the following day.

It was error, therefore, to refuse defendant's motion to strike out testimony as to the cost of the new plot in which the defendant's father was buried, gratuities or tips to the gravediggers in that cemetery, expenses for automobiles, and expense for a rabbi at the second service.

**APPEAL** by the defendant, Hebrew Community of Borough Park, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 7th day of July, 1920, upon the verdict of a jury,

and also from an order, entered in said clerk's office on the 9th day of July, 1920, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

*Abraham Wielar* [*Harry Aaron* with him on the brief], for the appellant.

*Stanley C. Fowler*, for the respondent.

KELLY, J.:

The complaint alleges that David Harrison, the father of the plaintiff, died on May 18, 1919; that he was a member of the defendant religious corporation; that on the said eighteenth day of May the defendant contracted with the plaintiff in consideration of \$410, "to furnish and supply everything necessary for a proper and fitting burial and funeral of said David Harrison, in accordance with the rites of said defendant;" that defendant agreed to furnish and supply all of the necessary raiment, undertaker, undertaker's services, coffin, hearse and coaches, to conduct the funeral ceremony on May nineteenth, and to furnish a proper burial place for the body of said David Harrison, in the Mt. Judah Cemetery, Cypress avenue, Queens county, and at said burial place, on May nineteenth, to officiate at and conduct a proper and fitting burial ceremony over the remains of the deceased in accordance with defendant's custom and the religious belief of defendant and said decedent. The plaintiff alleges that he agreed to pay and did pay defendant the sum of \$410 for the purposes above set forth, but defendant failed and refused to perform its agreement, and that by reason thereof the plaintiff was obliged to and did furnish the necessary raiment and funeral coaches and a burial place in a cemetery other than Mt. Judah Cemetery, and that the burial by reason of defendant's neglect was had without defendant officiating thereat and performing its rites and ceremonies.

The plaintiff alleges that he was compelled to expend money, and was "subjected to great physical and mental pain and torture" in securing a new burial place, so as to bury deceased "in any way according to the rites of his church"



and in the time and manner prescribed by the church. He alleges that he has been damaged in the sum of \$5,000.

The defendant answered with a general denial, and for a first separate defense alleges that on May 18, 1919, it agreed with plaintiff to sell and convey to him two graves in the cemetery named for \$410, and that it executed and delivered to plaintiff a deed to said two graves. For a second separate defense it alleged that Mt. Judah Cemetery, which was the property of defendant, was in the control of and was operated by Highland View Cemetery Corporation, which had the sole and exclusive charge of digging the graves in Mt. Judah Cemetery. Defendant alleges that David Harrison, deceased, was an honorary member of the defendant's organization, and as such was not entitled under the constitution and by-laws to "any burial rights," but that on May eighteenth the defendant "gratuitously and without consideration promised to supply a burial for said David Harrison, such as a regular member in good standing in said organization is entitled to." Defendant alleges that Mt. Judah Cemetery was and is "operated and controlled by persons other than the defendant," and that on May nineteenth, at the time of the funeral, the Highland View Cemetery Corporation failed to dig the grave although defendant in time demanded that the grave be prepared; that the Highland View Cemetery Corporation offered to dig the grave the following day, but that plaintiff refused to avail himself of the offer and caused the remains of deceased to be interred elsewhere.

The evidence in the record shows that on the day of the death the defendant offered voluntarily to prepare the body for burial, to provide an undertaker, a hearse and one coach, which was provided for by the by-laws of the congregation, to conduct religious services and provide a grave in Mt. Judah Cemetery, which was a cemetery or burial ground owned by defendant in the larger Highland View Cemetery. The defendant claiming that under its rules a man and woman could not be buried in the same grave, the plaintiff, who did not live with his father and mother but at Far Rockaway, objected to this arrangement and insisted that a grave be provided in which his mother, still living, could be buried with her husband when the time came. Thereupon an agree-

ment was made by which defendant sold to plaintiff two graves in another portion of Mt. Judah Cemetery where the husband and wife could be buried together; that the price agreed upon was \$400 and \$10 for a "watcher." The plaintiff agreed to this, and a deed was executed by defendant conveying the two graves to plaintiff. Defendant supervised the funeral, employing an undertaker, conducted the funeral services at the synagogue and gave notice to the Highland View Cemetery on May nineteenth to open the grave. It is apparent that the community and its officers were ready in good faith to bury the deceased according to the rites of their church. The plaintiff, living in Far Rockaway, says he is not an orthodox Jew, and with the widow and the children, wished to show all honor to the deceased. They wished the decedent buried according to the orthodox Hebrew rules, but these rules called for very simple ceremonies and a very simple funeral. It appears that the members of the community were working people, each of whom was called upon to contribute twenty-five or fifty cents towards the expenses of the funeral of a fellow-member. The undertaker's bill, paid by defendant, was \$26.50.

The plaintiff and his sister respected the old gentleman's orthodox religion, but it is very evident that they resented the simplicity, etc., enjoined by these regulations. Plaintiff says: "Of course, I did not know anything about Jewish affairs, how they go on with those things. I never had experience." The plaintiff, instead of accepting the grave provided under the rules of the Community, bought and paid for two other graves in what he considered a more suitable part of the defendant's cemetery, where the husband and wife could be buried together, and he and his family and friends followed the body to the cemetery in a retinue of automobiles. When the funeral arrived at the cemetery gates it was five o'clock in the afternoon and the Highland View Cemetery officials who controlled the cemetery would not permit the funeral to enter, claiming they had not received timely notice to open the grave. The president of the defendant Community, who was present, endeavored to obtain admission, offering to pay any additional charge which might be made, but without success. He then offered to place the body of

the deceased in a receiving vault close by and to furnish "watchers" from the sixty to seventy members of the Community who were present to do honor to the deceased and who offered voluntarily to remain with the body over night. And the president proposed that the interment could take place the following morning.

But the plaintiff, possibly under the strain of the situation, would not listen to the offer of the Community. He denounced the defendant and the cemetery, stating that he would not allow the body of his father to be interred in such a place, and the unfortunate incident culminated in threats of bodily violence against the officers of the defendant corporation, who were obliged to escape as best they could. The plaintiff immediately proceeded to an adjoining cemetery, where he bought two graves for \$210. He had his father's body placed in the receiving vault of the new cemetery, and on the following morning he conducted practically a new funeral with his relatives and friends, a rabbi from Far Rockaway, and a new lot of automobiles. He was liberal in his gratuities to the cemetery employees, and generally the obsequies were conducted in entire accordance with his wishes.

The plaintiff still has the deed by which the defendant Community conveyed to him the two graves in Mt. Judah Cemetery. Plaintiff makes some point about what he says is a mistake in his name. He is described in the deed as "Morris" Harrison, whereas he says his name is "Mortimer A." Defendant's officers say he told them his name was "Morris," and his father's will describes him as "Morris Aaron Harrison." There is no doubt about the identity of the grantee, and plaintiff retains the deed and is the owner of the two graves. He has never offered to surrender the deed.

The defendant Community did all that it was obliged to do up to the time the funeral left Borough Park. There is complaint that it did not start on time, but that is not unusual. Defendant's president says that the hour was fixed for two o'clock so that the members of the congregation could attend, as they were all working people. They did not get away until two or three o'clock. There is no legal grievance in that. There were sixty to seventy-five members of the

Community at the cemetery, all coming to honor the dead man. The Community paid the undertaker and for the one coach, as provided in the by-laws, and the members paid for their own coaches, automobiles or whatever they used. The plaintiff, and the other members of the family of deceased, came in automobiles, and the plaintiff asks seventy-five dollars for automobile hire on the day of the funeral and seventy-five dollars more for the next day.

The cemetery authorities based their somewhat arbitrary refusal to admit the funeral at five o'clock, on the ground that they did not receive notice to open the grave until three o'clock, whereas it should have been given by noon. The defendant's messenger took the precaution of going to Far Rockaway to have plaintiff's check certified before giving the order to open the grave. The defendant's officers denied all knowledge of the cemetery regulation as to notice before noon time, and gave evidence that the cemetery authorities had previously accepted orders to open graves at any time, and they produced a circular issued by the superintendent after the funeral in question, providing for an extra charge for funerals arriving after five P. M., and that no funerals would be admitted after six P. M.

The learned trial justice opened the door wide for the plaintiff and the jury on the question of damages. Plaintiff, after a fashion, on the motion to dismiss, said that while he would not withdraw his claim for damages to his feelings, he would concede that "the law is against any such thing, \* \* \*. I do not elect, I am forced. The Court: Of course, you can only recover here for breach of contract. Mr. Fowler: I propose to follow the law, if the Court please."

The court said to the jury of the plaintiff's right to recover: "He is entitled to recover such damages as you can say reasonably and proximately flow directly from that breach. \* \* \*. The damages are such as will put the plaintiff in the same position, as near as money can do it, that he would have been in if the contract had been fully performed by the defendant." It is apparent from the entire charge that the learned judge practically charged the jury as matter of law, that there had been in fact a breach of the contract by defendant. It does not appear that the matter was directly

called to his attention by request or exception. He itemized plaintiff's claims for damages which he totaled at \$464.25, including \$210 for the new plot, mourners, gravediggers, automobile hire, expenses for the second rabbi, for the shroud, etc., but there is no word about defendant's performance of its obligations or its responsibility for the refusal of the cemetery superintendent to admit the funeral on its arrival at the cemetery. He told the jury that it was true plaintiff had received the deed for the two lots (for which he had paid \$400), and that it was still in plaintiff's possession, and told them, "As the law seems to be in this case, it is perfectly proper that an allowance should be made for that plot." And he proceeded to tell the jury that there was evidence that such plots were only worth \$50, and "It is for you to say, gentlemen, what allowance should be made by reason of that fact." But the jury had no right to rescind plaintiff's purchase of the two graves, nor did plaintiff ask rescission.

In other words, although plaintiff concedes that he purchased the two graves for \$400, and although he received and retained the deed in fee simple for the two graves, the jury were allowed to say that they were really worth but \$50.

There is no dispute that plaintiff voluntarily purchased the two graves for \$400. He was not forced to buy them. The Community offered him a grave for his father without charge. He insisted on these two graves in a particular location, he refused two graves "next to the children" and bargained with defendant, getting the price down to \$400.

The learned trial judge over objection and exception interrogated defendant's president, Silverman, as to the profit accruing to the Community in the sale of the graves, and plaintiff's counsel over objection and exception cross-questioned Silverman as to the Community's desire to make money out of selling the plots. Silverman was a collector for Burns Brothers, coal dealers. None of the officers of the Community received salaries. I think this evidence was improperly elicited and admitted over exception. The same error occurred in the evidence of Langridge, the superintendent of Highland View Cemetery, a witness for plaintiff.

I think the trial justice should have submitted to the jury, first, the question whether the defendant did not in fact

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perform its obligations under the rules and regulations governing the funerals of its members. Did they not convey the two graves bargained for, and conduct the funeral up to the gates of the cemetery? On the evidence there is grave doubt whether the defendant was responsible for the refusal of the cemetery superintendent to admit the funeral. But in any case it would seem that the damage growing out of that refusal was the expense of keeping the body over night and for a coach or carriage in accordance with the by-laws for the family on the succeeding day. I also think that error was committed in refusing over exception defendant's motions to strike out testimony as to cost of the new plot in Mt. Nebo Cemetery, gratuities or tips to gravediggers at Mt. Nebo Cemetery, expenses for automobiles on May nineteenth and May twentieth, expense of taxicab to obtain new burial permit on May nineteenth and expense for a rabbi on May twentieth.

While this court might reduce the recovery, still in a case of this description it would appear that the interests of justice are best served by ordering a new trial.

The judgment and order should be reversed and a new trial granted, costs to appellant to abide the event.

BLACKMAR, P. J., RICH, JAYCOX and MANNING, JJ., concur.

Judgment and order reversed and new trial granted, costs to appellant to abide the event.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. ROBERT U. WINSPEAR, Relator, *v.* ARTHUR W. KREINHEDER, Acting Mayor of the City of Buffalo, N. Y., and Others, Respondents.

Fourth Department, July 1, 1921.

**Municipal corporations — certiorari to review proceedings of acting mayor of city in demoting police captain — qualifications of acting mayor who was personally interested — charges that relator violated rules of police department not sustained — relator reinstated.**

In certiorari proceedings before the acting mayor of the city of Buffalo to review the trial of a police captain which resulted in the captain being demoted to the rank of patrolman, it appeared that the counsel for the

relator objected to proceeding to trial before the acting mayor on the ground that he was disqualified because the charges in part, at least, arose out of personal controversies between the accused and the acting mayor. *Held*, that while in cases of this character a person shall not sit as judge in a case where he is interested, the evidence produced is hardly sufficient to make the case one of absolute disqualification.

Where an official's qualifications to hear the charges are questioned, and where he may be a witness to material facts on the trial and he is without judicial experience or training, his insistence upon presiding at the trial himself makes necessary a more critical examination of the evidence to determine whether or not the official presiding has, consciously or unconsciously, been influenced by his personal interest in the controversy.

On all the evidence, *held*, that the charges that the relator failed to obey certain rules of the police department in preparing and presenting charges against a patrolman in his precinct, as he was ordered to do by the chief of police, were not sustained.

Likewise the charge that he gave an interview to a newspaper wherein he censured the acting mayor, contrary to the rules of the department, was not sustained by the evidence.

The fact that the relator sent a letter directly to the acting mayor, which he desired him to read, in violation of the rule of the department that all communications must be made through the office of the chief of police, did not justify the relator's demotion to the rank of patrolman, and he should be reinstated.

CERTIORARI issued out of the Supreme Court and attested on the 11th day of November, 1920, directed to Arthur W. Kreinheder and others, commanding them to certify and return to the office of the clerk of the county of Erie all and singular their proceedings had in reducing Robert U. Winspear from the rank of captain of police to the rank of patrolman, and assigning him to duty as patrolman in the eleventh precinct in the city of Buffalo.

*Kent, Cummings & Means* [Ralph S. Kent of counsel], for the relator.

*William S. Rann, Corporation Counsel* [Frank C. Westphal of counsel], for the respondents.

DAVIS, J.:

The relator is a captain of the third police precinct of the city of Buffalo. On October 20, 1920, charges were formally preferred against him by the chief of police. A trial was had

before the acting mayor, beginning on November fourth, and a decision was made November eleventh, finding the relator guilty of the charges; and he was punished by being reduced from the rank of captain to that of patrolman.

The first question presented involves the right of the acting mayor to hear and to sit in judgment on the charges preferred against the relator. The counsel for the relator objected to proceeding to trial before the acting mayor on the ground that he was disqualified, because the charges in part, at least, arose out of personal controversies between the accused and the acting mayor, and the latter had prejudged the case; and in effect the charges were being tried before the man who instigated them.

There is ample authority in cases of this character that a person shall not sit as judge in a case where he is interested, and that the accuser may not also be the judge. (*People ex rel. Hayes v. Waldo*, 212 N. Y. 156; *People ex rel. Pond v. Trustees*, 4 App. Div. 399; *People ex rel. Miller v. Elmendorf*, 51 id. 173.)

But the evidence produced is hardly sufficient to make a case of absolute disqualification. The rulings on the admissibility of evidence were apparently free from bias and made in a spirit of fairness. But the facts developed as to personal controversies between the acting mayor and the relator in relation to the charges, and the cross-examination of the latter by the former as to transactions involving a question of veracity between them, are sufficient to indicate that the atmosphere of the trial was not what we ordinarily expect when a just decision is reached.

There were other disinterested officials to whom the duty of passing on these charges might have been delegated. And where an official's qualifications to hear the charges are questioned, and where he may be a witness to material facts on the trial and he is without judicial experience or training, his insistence upon presiding at the trial himself, makes necessary a more critical examination of the evidence to determine whether or not the official presiding has consciously or unconsciously been influenced by his personal interest in the controversy.

Stripped of their technical language the charges (five in



number) in brief are as follows: That the relator failed to obey certain rules of the police department in preparing and presenting charges against Officer Oberteau, a patrolman in his precinct, as he was ordered to do by the chief of police (two of the charges cover this same subject); that he gave an interview to a newspaper wherein he censured the acting mayor, contrary to a rule of the department; that the chief of police received a letter containing a complaint which he sent to the relator with directions to investigate the statements in the letter and report thereon, and that he failed and neglected to so investigate and report, but caused the letter to be delivered to the acting mayor, in violation of the rules; and that the sending of said letter directly to the acting mayor, without having the communication passed through the immediate commanding officer, was a violation of another rule of the department.

This simple statement of the charges indicates that they are in their nature of the most technical and unsubstantial character. Speaking generally, there is nothing in them that pertains to inefficiency, misconduct or corruption in the performance of police duty. At best they represent a breach of certain rules of the department. It does not appear how many rules there are for the government of the department, but one offered in evidence is No. 518. It ought not to be difficult at any time to discover a technical violation of one or more of these numerous rules. The charges were made against a man who had an excellent police record for upwards of nineteen years, during which time he had risen from patrolman to captain. These facts, taken in connection with the severe punishment visited on the relator, naturally arrest attention and invite inquiry into the circumstances leading to such result.

Some reasons are not far to seek. The relator was captain of what is known as the "vice squad," and in his district were located the greater number of the disorderly houses of the city. He was appointed as captain of that precinct by the predecessor of the acting mayor, to wipe out the lawlessness of the district, and he was evidently diligent in the performance of that duty. But he seems to have differed with one temporarily in superior authority as to the methods

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of dealing with vice and incurred his displeasure. There is little doubt from the evidence that the acting mayor believed that the correct method of dealing with the social evil was by segregation of these lawless elements in districts, which, of course, could not be done without express or implied relaxation of law enforcement; and that Captain Winspear believed in ceaseless attacks on vice wherever found. They represented two conflicting ideas engaged in a never-ending struggle in municipal government — the so-called "liberal" policy which recognizes that vice and crime must always exist and should be temporized with, and the policy of strict enforcement which believes in unceasing war on the criminal and vicious elements in society. There is no harmony to be had between these schools of thought. There can be no reasonable doubt that the charges against the relator grew out of this conflict of ideas.

The facts relative to the charge against Patrolman Oberteau are, briefly, these: Oberteau was a member of the vice squad with a good record. He became involved in an altercation with some men at a restaurant in his district. These men wrote out some statements charging that Oberteau was intoxicated and committed an assault upon them, and these unverified statements came into the hands of the chief of police. He sent them in a sealed envelope by messenger to Captain Winspear. They were left on his desk, the captain being absent at the time. He did not receive them until the next day, and it appears that the envelope had been opened and some of the statements taken out before they reached his hands. By whom they were taken does not appear. It is claimed that there was some indorsement on these papers directing the relator to prepare and present charges against Oberteau, but the relator claims that indorsement was on no papers that came into his actual possession. He immediately began an investigation as to the truth of the charges. He learned that two of the men making the charges were convicted criminals, one having been convicted of a felony; another was a man of apparently no character. From independent witnesses he ascertained that Oberteau was not intoxicated, and on the subsequent trial before the acting mayor, Oberteau was acquitted of that charge. As to whether

or not the assault charged was a justifiable one does not sufficiently appear. Within two days from the time relator actually received them, the chief of police recalled the papers, and the charges were preferred against Oberteau by an inspector who had co-ordinate authority. The chief testifies that he never directed the relator to prepare the charges. He would have been entitled to a reasonable time to investigate the matter and prepare the charges which he must sign and verify upon oath, and this charge of neglect of duty as preferred is not supported by the evidence.

The charge relative to the interview in the newspaper has even less substantial foundation. After Winspear had been suspended and before charges were actually preferred, and while the whole matter was a subject of public interest in Buffalo, an official of a Sunday newspaper called Winspear's residence on the telephone and asked for a photograph which they might publish in connection with the interesting developments in the police department, and said that he would send a messenger for it. Shortly thereafter an eighteen-year-old boy appeared at Winspear's home and there was some discussion about the photograph. There was a few minutes conversation between him and Captain Winspear relative to the police situation, during which no notes were taken, and the boy departed with the photograph. Subsequently he and another man, who was not present, wrote up an account of the friction in the police department, and assumed to quote Captain Winspear. This article was revised by still another man and was finally printed. Evidence that the relator gave out an interview criticising his superiors is entirely lacking.

The other charges have to do with a raid made by Captain Winspear on the Victoria Hotel, which it was charged was a house of assignation. The clerk and twelve inmates pleaded guilty to criminal charges, and thus justified the raid. Some unknown citizen wrote a letter to the chief of police commending the police for raiding this place, and stating that many people were inquiring why they did not raid Heinike's Hotel, which he claimed to be a place of the same character. This letter the chief of police sent through an inspector to Captain Winspear, with directions to investigate. There had been some controversy between the acting mayor and the

captain relative to these places, and as to the methods the latter was employing in closing them. Apparently the captain desired to call to the acting mayor's attention the fact that there was some public approval of his methods, so he sent an officer with the letter to the acting mayor with a note of his own, asking the latter to read it as a matter of interest to him, and to then return it by the bearer so that the matter could be investigated. The acting mayor apparently became angry and kept the letter. The evidence is that the relator proceeded with his investigation, and there is no foundation for the charge that he failed and neglected to make the investigation ordered by the chief of police.

But the learned counsel for the respondents says that the last charge is the most important of all, and that under the rules of the department, if the relator wanted the acting mayor to see the letter, he should have sent it back through the office of the chief of police, and in calling it directly to his attention he grievously offended against the rule and discipline of the department. This may have been a technical violation of the rule, although it is doubtful if it was intended to apply to an incident of this nature. It undoubtedly is intended to apply to formal official communications. Very likely it would have been a similar violation if the captain, with the letter in his pocket, had shown it to the acting mayor had they met on the street. But the charge is technical and trivial, and even in military life a commanding officer who would reduce to the ranks a subordinate with a long record of faithful service for such a slight infraction of military discipline, would be deemed a martinet. All the punishment that such an offense would merit would be a reprimand, or at most a fine of a few days' pay. There was apparently no conscious violation of any rule or omission of any duty on the part of the relator, and it is hardly worth while to engraft such rigid military rules upon our civil system, even in a department semi-military in its character.

In *People ex rel. Devaney v. Greene* (89 App. Div. 296, 299) WOODWARD, J., says: "While it is true that the statute vests the discretion in the police commissioner of determining the punishment, it is hardly possible that the Legislature intended that the extreme penalty should under ordinary

circumstances be visited upon a police officer for a mere technical violation of a rule which is not shown to have prejudiced any rights of the public or interfered with the proper discipline of the department." (See, also, *People ex rel. Gannon v. McAdoo*, 117 App. Div. 438; *People ex rel. Brennan v. Bingham*, 130 id. 710.) And in *People ex rel. Shires v. Magee* (57 App. Div. 281, 283) SMITH, J., says: "The counsel for the defendant has pressed upon our attention the argument that this conviction should be sustained in order to maintain the discipline of this commissioner in the police force. The importance of such discipline is recognized. Far more effective to maintain such discipline, however, would be fair and impartial action on the part of the commissioner, than to sustain a conviction, unwarranted either by law or by fact."

We have reached the conclusion that the facts established on the trial did not warrant the findings made by the acting mayor or his determination that the relator should be punished by reduction in rank. The findings of fact made by him are, therefore, disapproved, as is his conclusion that the relator was guilty of all the charges.

Having reached a conclusion on the merits, it is unnecessary to consider the question raised by the relator's counsel, whether the procedure adopted in making the charges was regular in respect to the time in which they should be preferred after the order was made suspending relator.

The determination of the acting mayor should be annulled and the relator reinstated, with costs.

All concur, HUBBS, J., in result only.

Writ of certiorari sustained, determination of the acting mayor annulled, and relator reinstated, with fifty dollars costs and disbursements.

ROBINA MERSEREAU, Plaintiff, v. WILLIAM KATZ and JOSEPH  
GARMINISKY, Defendants.

Second Department, July 22, 1921.

**Wills — devise of estate for life and after death of life tenant to her heirs — remainder contingent till termination of life estate — subsequent vesting of estate of children of life tenant in her did not vest remainder in tenant — life tenant cannot pass good title.**

Under a will devising land to the plaintiff for the term of her natural life and upon her death "to her heirs forever" the remainder created was contingent until the termination of the life estate therein contained and not till then did it become vested in the heirs of the life beneficiary.

Accordingly, though the plaintiff acquired the entire estate of her two children who have deceased, the remainder in fee did not thereby become vested in her and she could not give a good and marketable title.

The word "heirs" as used in the will was considered by the testator and used by him in its primary sense to designate those who succeed to real property by reason of relationship to a deceased and not a living person.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*Arthur R. Wilcox*, for the plaintiff.

*Moses Miller*, for the defendants.

MANNING, J.:

The controversy arises over the validity of the plaintiff's title to certain real estate, contracted to be sold to the defendants. The stipulated facts are as follows:

"II. Plaintiff is a daughter of Clark S. Merritt, deceased, who died a resident of said Port Chester, May 8, 1863, leaving a will \* \* \* proved before the Surrogate of Westchester County, May 22, 1863, whereby were devised her premises on the easterly side of South Main Street, Port Chester, 'for and during the term of her natural life, and upon her death I give and devise the same to her heirs forever.'

"III. Plaintiff married Jacob Mersereau, November 25, 1860, their only issue being:

"(a) Charles Henry Mersereau, son, born March 28, 1862, died May 2, 1900, without issue, never married, leaving a will \* \* \* proved before the Surrogate of New York County, May 18, 1900, whereby he gave his entire estate to his mother, said Robina Mersereau;

"(b) Robina Mersereau, Jr., daughter, born October 7, 1864, died February 23, 1897, intestate, unmarried and without issue, her only heir-at-law being her father, said Jacob Mersereau.

"IV. Jacob Mersereau died September 10, 1911, leaving a will \* \* \* proved before the Surrogate of Westchester County, April 12, 1912, whereby he gave his entire estate to his widow, said Robina Mersereau.

"V. The only children of said Clark S. Merritt were:

"1. Mary Elizabeth Merritt, who married George St. John, both deceased, whose only children and heirs-at-law were (a) Frank St. John, whose wife is Emma F. St. John, both living; (b) Egbert E. St. John, unmarried, living; (c) Clark S. St. John, deceased, without issue.

"2. Sawyer Merritt, unmarried, living.

"3. Hannah Matilda Merritt, who married John Henderson, both deceased, whose only child and heir-at-law was Mary G. Henderson, deceased, without issue.

"4. Clark S. Merritt, Jr., deceased, intestate, unmarried and without issue.

"5. Robina Mersereau, plaintiff herein.

"6. James S. Merritt, deceased, without issue, leaving a will proved before the Surrogate of Westchester County, April 12, 1919. \* \* \*

"7. Irene Merritt, who married John Duffy, both deceased, whose only children and heirs-at-law were (a) William Duffy, who married Minnie Duffy, and (b) William Duffy, who married Anna K. Duffy, all living. \* \* \*

"8. Three other children who died in infancy.

"VI. On January 25, 1921, plaintiff and defendants entered into a written contract whereby she agreed to sell and convey, and they agreed to purchase, said premises so devised to her for her life under her father's will, for the sum of \$27,500, it being agreed that application would be made to the court for authority to effect such sale in order to vest good

title in the purchasers, the deed thereunder to be delivered March 1, 1921, which proceeding was instituted under the provisions of Section 67, *et seq.*, of the Real Property Law.\*

"VII. Subsequent to the institution of said proceeding, counsel advised plaintiff that, after investigation, he was of the opinion that she was the sole owner of the fee of the premises, and that a deed executed, acknowledged and delivered by her, in due form, would vest the purchasers with sound title to the premises, the proceeding to obtain leave of the Court being unnecessary. Such a deed was thereafter tendered said purchasers, and \$6,500, the balance of the purchase money, and the delivery of the bond secured by purchase money mortgage, executed by defendants to plaintiff, as in said agreement provided, was by plaintiff demanded of defendants, but defendants, although willing to perform said contract, then, and ever since have, refused to comply with the terms of said demand, objecting that plaintiff is not the sole owner of the premises and that such a deed will not vest defendants with a good and marketable title to said premises.

"VIII. Plaintiff claims on the foregoing facts that under Clark S. Merritt's will, her (plaintiff's) son, Charles H. Mersereau, who was living at the time of Merritt's death, became then seized in fee simple absolute of the premises, subject only to her life estate therein, and the possibility of the same opening to permit other children of hers to share therein; and that plaintiff, upon the death of her son, acquired under his will all his interest, while the interest of her daughter, Robina, on her death intestate, passed to her father, Jacob Mersereau, which interest, on his death, passed under his will to plaintiff, who then became, and now is, seized of the whole fee of said premises."

The question is, can the plaintiff convey a good and marketable title to the premises in question?

She says she can. The defendants assert that she cannot. They say she has only a life estate in the property, with remainder to her heirs; and such being the case, they claim

\* Amd. by Laws of 1913, chap. 55; Laws of 1918, chap. 578, and Laws of 1920, chap. 639.—[REP.]



her "heirs" are only ascertainable at the time of her death. Hence, the legal problem is, whether the remainder, under Clark S. Merritt's will, was vested or contingent.

The clause in the will of Clark S. Merritt which gives rise to the dispute is as follows: "I give and devise unto my daughter, Robina, the house and premises as the fence now stands upon which she now lives, \* \* \* for and during the term of her natural life, and upon her death I give and devise the same to her heirs forever."

The plaintiff claims that the remainder vested, taking effect immediately upon Clark S. Merritt's death; and that as the plaintiff then had an heir, viz., her son Charles, he became seized of the fee, subject only to her life estate, with the possibility of the same opening to permit other children of hers to share therein. That upon the death of her son, she acquired under his will all his interest; while the share or interest of her daughter, Robina, who died intestate, passed to her father, Jacob Mersereau, which interest, on his death, passed under his will to the plaintiff; and plaintiff, therefore, became and now is seized of the whole fee to the property in question; and in support of her contention cites section 40 of the Real Property Law, which reads as follows: "A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."

The plaintiff also urges that the law not only favors the vesting of estates, but such a construction of a will as avoids the disinheritance of children who happen to die before the time of distribution.

This proposition is elementary; but unfortunately for the plaintiff in the present case, the remainder by the terms of the will does not pass to children of the testator, but to the heirs of his daughter at her death. The majority of cases cited by the plaintiff affect a situation where the remainder passes to children of the testator, and hence do not apply to the situation presented in the present case.

I am led to the conclusion that the question at issue here

is clearly within the doctrine laid down in and disposed of by *Moore v. Littel* (41 N. Y. 66), considered the leading case upon the subject, and a case which stands unreversed and is considered a controlling authority to-day. In that case the clause of the grant was substantially the same as the clause of the will under consideration. It read, to John Jackson, "for and during his natural life, and after his decease to his heirs and their assigns forever."

In the instant case the words are "unto my daughter, Robina, the house and premises \* \* \* for and during the term of her natural life, and upon her death I give and devise the same to her heirs forever."

In *Moore v. Littel* the court held that under such conditions the children of the life tenant take a vested interest, although liable to open and let in other after born children of the life tenant, and liable also in respect of any child to be wholly defeated by the death of such child before that of the life tenant; and while it is true that such interest, whether vested or contingent, is alienable during the life of the life tenant, it is subject to be defeated in like manner as before. Hence, if we consider that the children Charles H. Mersereau or Robina Mersereau, Jr., had vested remainders, these were defeated by their deaths prior to that of the mother, the plaintiff.

I think it is apparent from the general scheme of the will that Clark S. Merritt intended that the remainder should be contingent until the termination of the respective life estates therein contained, when they should become vested in the heirs of the respective life beneficiaries. The very wording of the will seems to indicate that such was the testator's purpose. The language used by him in each bequest or devise is, "I give and devise [or bequeath] the same to her [or his] heirs forever;" that to his son Clark is, "and on his decease to his heirs forever."

The word "heirs" is thus employed in each case in designating those in whom the remainder is ultimately to vest; and accordingly it would seem as though the word "heirs" was considered by the testator and used by him in its primary sense, where it is employed to designate those who succeed to real property by reason of relationship to a deceased and

not a living person. Hence the maxim, *nemo est hæres viventis*.

The doctrine is discussed in *Heard v. Horton* (1 Den. 168), a leading and much quoted case; *Heath v. Hewitt* (127 N. Y. 166, 173, 174); *Vannorsdall v. Van Deventer* (51 Barb. 137); *Matter of Green* (60 Hun, 512); *Cushman v. Horton* (59 N. Y. 149, 153, 154), and *Gilliam v. Guaranty Trust Co.* (111 App. Div. 656, 660).

As I read the cases, I am inclined to the belief that the remainder did not become vested in the plaintiff under the wills of Charles Henry Mersereau and Jacob Mersereau; and as a consequence title to the premises in question cannot be made during the lifetime of the plaintiff, for until her death no one can answer to the description of "heirs." (*Moore v. Littell*, 41 N. Y. 66; *Manhattan Real Estate Assn. v. Cudlipp*, 80 App. Div. 532, 536; *Jackson v. Littell*, 56 N. Y. 108; *Doctor v. Hughes*, 225 id. 305, 310; *Clowe v. Seavey*, 208 id. 496, 501, 502; *Byrnes v. Stilwell*, 103 id. 453, 462; *House v. McCormick*, 57 id. 310.)

The construction of the will contended for by the defendants is the correct one, and there should be judgment for them as prayed for in the submission, with costs.

Judgment ordered for the defendants on the submission, with costs.

BLACKMAR, P. J., MILLS, RICH and KELLY, JJ., concur.

Judgment for defendants upon agreed statement of facts, with costs.

# CASES REPORTED WITH BRIEF SYLLABI

AND

## DECISIONS HANDED DOWN WITHOUT OPINION.

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THIRD DEPARTMENT, MAY, 1921.

HOWARD B. HUMISTON, Appellant, *v.* MYRON C. WOOD, as Administrator,  
etc., of NATHANIEL W. CARMAN, Deceased, Respondent.

*Trespass — action to recover damages for breaking into and setting fire to  
building — evidence tending to show insanity of tortfeasor — admissibility.*

Appeal by the plaintiff from a judgment of the Supreme Court, entered in the office of the clerk of the county of Ulster on the 23d of October, 1916, upon the verdict of a jury, and also from an order entered on the 8th day of November, 1916, denying plaintiff's motion to set aside the verdict and for a new trial made upon the minutes.

Judgment and order affirmed, with costs, under section 1317 of the Code of Civil Procedure. All concur, except Kiley, J., dissenting, with a memorandum, in which Woodward, J., concurs.

KILEY, J. (dissenting): The evidence in this case shows, among other things, that the appellant Humiston, prior to 1909, worked for the defendant's intestate, Nathaniel W. Carman. Previous to the year, and in the year above mentioned, Carman was in the undertaking and furniture business at Kerhonkson, Ulster county, N. Y. Appellant had left the employ of Carman and had established a similar business at the same place. Carman was a man nearly seventy years of age at the time the first extraordinary event, hereinafter mentioned, happened. He was angry because of this competition which his former employee had developed against his business. It was a formidable competition and resulted in the practical destruction of Carman's business. He was often heard to say previous to June, 1909, that he would put the appellant out of business and he used other words showing extreme hostility. Those statements are not denied in this record. The appellant rented, for use in his business, a barn in the village of Kerhonkson, of one Lundrigan, in which he kept his horses, his hearses and stock, consisting of caskets, chemicals and other personal property. On June 2, 1909, this building, with its contents, was destroyed by fire. Beyond doubt, this fire was incendiary in its origin. Those who entered a part of the burning building got the odor of benzine or gasoline, saw old sacks saturated with it and there was an explosion of powder; the appellant was burned about the face and head when that explosion occurred. Suspicion pointed toward Carman, but the evidence was such, at the time of the fire

and immediately thereafter, that the verdict of a jury in favor of Carman, as the evidence stood at that time, would not be questioned. Appellant received from an insurance company \$1,500; he built up his business again and continued at the same place. I think it can fairly be inferred that Carman's business dwindled to a fraction of what it was before this competing business was established. On the 30th day of January, 1912, in the night time, Carman was caught preparing or attempting to set appellant's building, the same place and business, on fire. He was using the methods and materials that were used to insure a fire on the previous occasion, June 2, 1909; the burlap sacks, gasoline and powder were found in his possession, and to the appellant and in the presence of others who testified upon this trial, he admitted that he set the fire that destroyed the building and contents in June, 1909. Immediately thereafter he denied such admission. The defense was a general denial and that Carman was insane on the last occasion, January, 1912. He was adjudged insane immediately thereafter and sent to an asylum where he subsequently died. Appellant's loss was about \$7,000, and, sane or insane, Carman's estate is liable for the loss if he set the fire that destroyed the property. The defense of insanity is not directed toward the fire of June, 1909; the general denial only covers that part of the complaint. The defense of insanity is not urged as a defense to his acts of January, 1912. These are admitted, but the defense of insanity is used to excuse the admission he made that he set the building on fire in June, 1909. This position does not rob the circumstances present in 1912 of their bearing upon the similar circumstances present in 1909. The evidence clearly shows that the same agencies to start and intensify the heat and accelerate the progress of the fire, when once started, were used at the first fire as on the second attempt. The record is mute as to any evidence of insanity shown by Carman previous to this night in January, 1912, when his second and last attempt was made. I use the words "his second and last attempt" advisedly. I think the evidence would sustain the finding that Carman set the first fire; however, the jury found adversely to appellant, and there is much force in the opinion of Mr. Justice Cochrane that the verdict should stand. The question is did the plaintiff in the action have a fair presentment of his case under the circumstances? The jury was practically told that if Carman was insane when he made the admission the verdict should be for the defendant. The situation in which the plaintiff, appellant, found himself was not that of a clash between the truth or falsity of his evidence showing admission of former guilt, but the admission on the part of the defendant of all that was said, and the answer that Carman was insane when he said it; therefore, he could not make a binding admission. This did not wipe out the facts and circumstances that were admitted, the attempt and the agencies used, their identity with the former agencies present at the first fire. These distinctions would have been proper subjects of a charge, and they are important here, on what I regard as error in the admission of evidence. The whole defense turned upon the question of the sanity or insanity of Carman at the time of his admission and subsequent repudiation of such admission. It must be admitted under these circum-

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stances small errors may work large results. I will give one or two examples from the record; there are other similar questions and answers therein. Witness Marshall is on the stand called by defendant: "Q. Now, Mr. Marshall, from all of the acts, statements, answers and conduct that you have described *and saw that night* by Mr. Carman, did they impress you? A. They did." Q. How did they impress you, as being rational or irrational? Objection. Then follows a whole page of suggestions from the court, and reformed questions by defendant's counsel and the court, and finally the court asked the witness: "Were those acts rational or irrational?" Objection by plaintiff's counsel, overruled. "A. Irrational." Again, one Gillespie was called by the defendant, and after defendant's counsel had attempted to ask some questions along the same line, the court asked the following question: "Q. Was his saying that he did set the building on fire, and then denying it, and saying that he did not set it on fire, rational or irrational?" Objection, overruled. "A. Irrational." Both of these witnesses were lay witnesses, non-experts, and there are other instances in the record. The lay witness can only give his impression; he cannot give an opinion as to sanity or insanity. From a long line of cases I conceive this to be a proper question: "Taking into consideration the conduct, statements, conversations, and appearance of \* \* \*, as testified to by you, how did they impress you, at the time, as rational or irrational?" The questions here enumerated and found in the record do not ask for witness' impression, but were the statements rational or irrational. It was for the jury to say whether the man was rational or irrational and whether witness' impression was justified by the evidence he detailed and upon which he was supposed to found his impression. The following authorities have some bearing upon the question here considered: *Holcomb v. Holcomb* (95 N. Y. 316); *People v. Strait* (148 id. 566); *Matter of Myer* (184 id. 54). If this evidence made any impression upon the jury it was against the plaintiff and doubly so when the court put the questions. I do not think it can be said only harmless error was committed. Woodward, J., concurs.

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Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of JOSEPH MURRAY, Respondent, for Compensation under the Workmen's Compensation Law, against H. P. CUMMINGS CONSTRUCTION COMPANY, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., Insurance Carrier, Appellants.

*Workmen's Compensation Law — injury arising out of and in course of employment — paralysis of left side — working in intense heat.*

Appeal from an award of the State Industrial Commission, entered in the office of said Commission April 22, 1920.

Award affirmed. All concur, except Kiley, J., dissenting, with an opinion.

KILEY, J. (dissenting): The Commission first rejected the claim of the claimant; upon a rehearing the Commission reversed its previous decision

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and found in favor of claimant. The Commission found that on July 16, 1918, the claimant received his injury; that on said day at the place where claimant "was injured, the temperature was exceedingly high, in fact it was one of the hottest days in the year, and the radiation of the heat from the surrounding sand and gravel intensified the heat to an unusual degree. The air was inactive, there was no breeze blowing \* \* \*. These injuries resulted from a cerebral hemorrhage produced by the extraordinary exertion and unusual strain and excessive heat heretofore described which accelerated pulsation that intensified the blood pressure and ruptured an artery in the brain." The award was twenty-six dollars and ninety-two cents bi-weekly for life. The carrier objects upon the ground that the disability is not the result of an accidental injury "arising out of and in the course of employment;" that it is not compensable under the Workmen's Compensation Law, and that no injury was sustained "arising out of and in the course of employment." \* The facts are as follows: Claimant was forty-nine years old at the time he received the alleged injuries, July 16, 1918. After twelve o'clock on that day he, with five or six other men, were sent to a sand pit to get out sand. A railroad track ran along one edge of the pit upon which flat cars were placed and upon which these men were to shovel sand. The cars, on the day in question, were not in place and had to be moved; this was done by using a pinch bar. The bar was used by inserting the tapered end between the car wheel and the rail, and pressing down on the opposite end of the bar, again raised up and reinserted between the wheel and rail and the same process repeated. In the intense heat the operation was hard work. Men would spell each other in using the bar. The car had been moved in place, and claimant, while he gripped the bar with his left hand, felt that hand contract and become numb; he went upon the car and was adjusting a plank so as to hold the sand upon the car, when his left ankle turned over; he managed to get to the corner of the car, was helped down, and it was then discovered that his left side was paralyzed. He had not felt well at any time during the day; he suffered no pain. All of the medical testimony agree that claimant had a cerebral hemorrhage, bursting of a blood vessel on the right or toward the central portion of the brain. The disagreement is as to what caused it. It appears that he had hardening of the arteries, and claimant's evidence is to the effect that the intense heat and the hard work increased the blood pressure so that the hardened artery gave way at its weakest point. Appellant's evidence is to the effect that conditions did not produce the break; that disintegration set in at some prior time and had progressed to such an extent that the final stage happened to be reached at this time rather than at some other time. This sand pit was really a sand bank on top of a hill. The sand had been taken out so that the bank upon one side was eight or nine feet higher than the floor or bottom of the pit. The other side was open and in such a condition as to the

\* See Workmen's Compensation Law, § 10; Id. § 3, subd. 7, as amd. by Laws of 1917, chap. 705.—[RSP.]

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nature of the surface that the railroad switch operated without difficulty. No breeze was stirring. The finding of the Commission is: "The temperature was exceedingly high, in fact it was one of the hottest days in the year, and the radiation of the heat from the surrounding sand and gravel intensified the heat to an unusual degree. The air was inactive, there was no breeze blowing." Again: "While performing this work it was necessary for him to use a great deal of physical effort and unusual strain for more than one hour," and further: "The strain, work and heat heretofore described were the producing causes." It will be observed that no finding was made that the claimant was subjected to any unusual or extra hazard. He worked in the open with the other men; neither sun nor heat could be corralled there, to any degree greater than any other place in the open air, save the one statement in the findings that the sand radiated the heat. No claim was made that the hazard was unusual. The claim is that the hard work in the heat was the proximate cause. It will be observed that claimant points to no unusual hazard the cause or foundation of which was created by his employer. There may be a hazard of employment not created by the employer, as for instance the assault cases that have been sustained. In *Campbell v. Clausen-Flanagan Brewery* (183 App. Div. 499) a driver of a brewery wagon suffered a sun stroke on the highway in the open. Mr. Justice Cochrane wrote: "The question is whether the deceased, by reason of his employment, was subjected to a special and increased hazard not common to the public in general but because of the particular circumstances under which he was required to work." He then cites the case of *Hernon v. Holahan* (14 State Dept. Rep. 587) and says the principle applicable to those cases was correctly stated by Commissioner Mitchell and quotes from that case as follows: "The deceased was required to work on a very hot day in a close car handling lumber, which required great exertion. This work under these circumstances, therefore, subjected him to a special and increased hazard. The deceased sustained a sun stroke, not by reason of a risk assumed by the public in general, but because of the special circumstances under which he was required to work." The inference is that the commissioner found that the deceased was subjected to a special and increased hazard, not assumed by the public in general. An award was had in that case and was affirmed in this court (182 App. Div. 126), Mr. Justice H. T. Kellogg writing the opinion. In 183 Appellate Division (*supra*) the appeal was by the claimant and this court sustained the determination of the Commission denying an award. These two cases represent the opposite poles of the holdings in this court on these heat cases. *Brezzenski v. Crenshaw Engineering Co.* (188 App. Div. 511) is another heat prostration case. The deceased, while at work along the tracks of an elevated railway on an intensely hot day, suffered a sun stroke, and died the next day. The widow and minor children had an award. It was reversed in this court and sent back for further action. Mr. Justice H. T. Kellogg, writing the opinion, said: "In the case at bar the Commission did not find that the deceased came to his death through exposure, by reason of his employment, to heat more excessive than that to which others were subjected, or through any



special hazard of his employment." The respondents urge that their contention is sustained by the holding in *Uhl v. Guarantee Construction Co.* (174 App. Div. 571); *Fowler v. Risedorph Bottling Co.* (175 id. 224); *Gibbons v. Marx & Rawolle, Inc.* (181 id. 142). Those cases all involve the question of a strain and its effect upon the heart. It is suggested, but not deciding the point, that there is a distinction between an individual strain to which the public, in general, is not subjected, and a sun stroke occurring in the open under circumstances to which many, and the public generally, are alike subjected. The struggle on the part of the claimant to bring out the facts in this case was directed toward showing the work was hard and the day hot. Claimant engaged to do his task on that day and in the temperature prevailing. The only item of evidence that looks like anything unusual or different from that existing anywhere in that locality was when it is said the sand reflected the heat; that is insignificant when we recall that claimant had not worked in the sand pit, but upon the track below the pit and in the open country. A man might be required to work in an excessively hot room, on a hot day, over a boiler, under a roof with the hot sun coming down, or in an inclosure exposed to the direct rays of the sun. Such is not the case here. This man was doing the work he was engaged to do; misfortune, which had pursued him, reached him at this time, and unless the Workmen's Compensation Law is amended so as to cover everything happening to an employee when at work, without regard to its cause, I do not see how this award can be sustained. If there was an unusual hazard, inherent in this employment, it ought to be so found; until it is so found the rule laid down in *Gentelung v. American Hide & Leather Co.* (194 App. Div. 9) should prevail. I favor a reversal of the award and the case be sent back to the Commission for such further action as may be advised.

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ALFRED MARKLE, Appellant, *v.* ZACHARY OSBORNE and Others, Respondents,  
Impleaded with Another.

*Mortgages — foreclosure — judgment against mortgagee for burning building as counterclaim against assignee of mortgage — assignment executed after fire.*

Appeal from a judgment of the County Court of Ulster county, entered in the office of the clerk of said county on the 23d day of April, 1919, allowing defendants' counterclaim against the plaintiff in the above-entitled action of foreclosure.

Judgment reversed and new trial granted, with costs to appellant to abide the event, on the ground of error in receiving in evidence the judgment against the assignor, and without considering any other questions in the case. All concur, except Kiley, J., dissenting, with an opinion, in which Woodward, J., concurs.

KILEY, J. (dissenting): This action was brought to foreclose a mortgage, and tried before the court without a jury. The mortgage bears date November 12, 1915. The terms of payment in said mortgage are as follows:

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"Interest November 12th, 1916, 1917 and 1918. \$100.00 on account of the principal, November 12, 1919, and interest, and \$100.00 on account of the principal on the 12th day of November in each and every year thereafter until the whole of said principal sum of \$1400.00 together with the interest thereon shall be fully paid." Interest rate is five per cent. Cornelia J. Terwilliger is the mortgagee named in said mortgage, and the defendant Zachary Osborne is the mortgagor named in said mortgage. On the 25th day of December, 1916, the said Cornelia J. Terwilliger, mortgagee, assigned the mortgage to Alfred Markle, plaintiff in this action. The mortgage contains a stipulation that if there shall be default in payment of principal or interest for thirty days, the mortgagee, may, at her option, declare the whole amount due. The action was commenced January 15, 1918, and in the complaint it is alleged that plaintiff has elected and does elect that the whole amount of said bond and mortgage become due and payable; that by another provision the whole amount became due immediately on default of payment as aforesaid. The complaint alleges that the whole amount was due before the commencement of the action. The trial judge upon evidence introduced upon said trial found that the mortgagee in said mortgage, Cornelia J. Terwilliger, while she was the owner of said mortgage, and about one year after the date thereof, burned the buildings upon the premises covered by said mortgage; that on December 24, 1917, Osborne, mortgagor, defendant herein, recovered a judgment against her for such destruction in the sum of \$1,377.50 damages, and \$123.15 costs. This amount, with interest, defendant Osborne set up as a counterclaim to any amount that might be found due the plaintiff. Whether this judgment can be used as a counterclaim is the main question upon this appeal. If we adopt the theory pursued by both parties on the trial, the decision of this question depends upon two other questions, namely, was the plaintiff a purchaser in good faith without notice, and is the defendant Zachary Osborne, by reason of any agreement or relation between him and plaintiff, estopped from setting up that defense or counterclaim? Appellant further urges that, in any event, he should have been allowed the \$450 received by Osborne as insurance in addition to the amount he was allowed in the judgment as rendered. The appellant urges that defendants, having set up as one of their defenses, conspiracy on part of plaintiff and others, could not abandon it upon the trial and rely upon their other defense. This position of appellant is not tenable. (Code Civ. Proc. § 507; *Conklin v. Woodbury Institute*, 37 App. Div. 610; *Wendling v. Pierce*, 27 id. 517.) The competency of the judgment roll in the action of *Osborne v. Terwilliger*, as evidence, if it is material, is not challenged in the appellant's brief. In other words, if the counterclaim could be offered by defendant Osborne and valid as such, the judgment roll is competent evidence and its reception not error. (*Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550.) As between the original parties to the mortgage, the counterclaim in question would be available to the mortgagor, defendant Osborne. (*Stickney v. Blair*, 50 Barb. 341; *Fort Miller Pulp & Paper Co. v. Bratt*, No. 2, 119 App. Div. 685.) The last case cited is an action of foreclosure. The rule laid down therein seems applicable

here. Did the plaintiff have such notice or knowledge of the claim that was being made by Osborne, that Mrs. Terwilliger set fire to his building, as to place him upon inquiry as to its foundation, before he paid for and took an assignment of the mortgage in question? Much of defendant's evidence was given to show that plaintiff had such knowledge. If he had, or, by reasonable investigation, could have had such knowledge under the circumstances obtaining in his and defendant's immediate neighborhood, before he took the assignment, he must be held to have taken his chances as to the outcome of his venture. The county judge tried the case, he knew his county and its people. A witness came upon the stand and testified to conversations had with plaintiff where the subject was discussed and the truth of the accusations against Mrs. Terwilliger was the subject of comment. He saw the parties, heard them and the witnesses testify, and his finding that plaintiff had such knowledge is not so against the weight of evidence as to justify a reversal of such findings. An examination of cases cited by appellant which he urges sustain him in the contention that, under the circumstances of this case, the judgment is not available to respondents as a counterclaim, reveal conditions and questions not found here. That is so, in large part, because appellant earnestly insists that fraud and fraudulent conspiracy are still vital elements in respondent's defense. If I am right in my conception of the trial and the position taken by defendant, and the evidence given upon the trial, that defense was abandoned, no evidence was introduced to sustain it upon the trial, and it is not a question here. Respondent, in his brief and upon the argument, goes still further than the position above considered; he maintains that this mortgage being a non-negotiable instrument, not passing by delivery or indorsement, the plaintiff, even if he did not have notice of the claim arising out of the fire, took the mortgage subject to all defenses, in law or equity, that defendant could muster and sustain. At the time this action was commenced the mortgage, by force of the stipulations contained therein, was due, and defendant's claim for damage had ripened into judgment. These facts seem to produce a condition contemplated in sections 500, 501 and 502 of the Code of Civil Procedure; nor do these conditions run counter to the prohibitive provisions contained in section 41 of the Personal Property Law. Under the circumstances it would seem that this counterclaim was available to the defendant to reduce plaintiff's demand. *Owen v. Evans* (134 N. Y. 514); *American Guild v. Damon* (186 id. 360) and *Seibert v. Dunn* (216 id. 237) are to the same effect. In *Hill v. Hoole* (116 N. Y. 299) the court considers the question from both angles, viz., that the counterclaim is rated in every aspect of the case, and also the purchase of the mortgage without notice. In the course of its opinion the court says: "The proposition is well established that the assignee of a mortgage takes it subject to all the defenses, legal and equitable, which the mortgagor has against the enforcement of it by the assignor at the time of the assignment." Thus far it follows that the judgment as rendered can stand. The appellant urges that defendant Osborne is estopped from setting up this counterclaim because of something he said to plaintiff which had the effect of inducing

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him to purchase the mortgage when he, Osborne, knew he had this counterclaim. The first answer to that is that plaintiff gave evidence upon the trial that he commenced negotiations to purchase the mortgage some months before the fire occurred. *Secondly*. It refutes plaintiff's claim that he was a purchaser in good faith and without notice; if he had no notice of defendant's claim it was not necessary to fortify his position by a statement or agreement from defendant Osborne. What was said, as found by the court upon sufficient evidence, does not constitute an estoppel; his finding in that regard should stand. Some months after the judgment herein was rendered the judge signed requests to find for the plaintiff. Respondent urges a disregard of such findings because they were signed after judgment was rendered. Under a well-considered opinion by Mr. Justice Taylor in *Famous Mfg. Co. v. Gibson* (98 Misc. Rep. 4) such practice is not fatal. While some of the findings would seem to conflict with his judgment as rendered, they do not disturb it, and should be disapproved as a matter of course, where there is any apparent conflict. I fail to find in any of them sufficient to change the result. The evidence discloses that defendant collected \$450 from the insurance company on account of the loss of his buildings by fire. Appellant urges that this should have been applied toward the reduction of defendant's judgment before it was allowed as a counterclaim. The respondent replies that the plaintiff is a tortfeasor, and that defendant will have to return that amount to the insurance company. In considering this phase of the controversy, it must be borne in mind that respondents abandoned their position, taken in the complaint upon the question of tort; that this is an equitable action; that he who seeks equity should do equity. The plaintiff is not a tortfeasor in the sense the respondent would have that term applied. The most he can be charged with is the taking of an assignment of this mortgage, for value, with a suspicion, or knowledge sufficient for a well-grounded suspicion, that the thing he was buying had inherent infirmity, that might cut down or wipe out its value and that he took that chance. The defense of conspiracy was not urged nor proved and as we have seen was entirely abandoned. Plaintiff had nothing to do with the fire, was in no way connected with it or its origin. The evidence in this record as to the \$450 is that it was paid, and the further evidence that there was some dispute trying to reach a settlement, which extended beyond the time limited in the insurance policy. The policy is not in evidence. It does appear that defendant was told that the time for settlement had passed, and if the company was still willing to pay, they had better agree and get the money. There is no evidence in the record that this \$450 will have to be returned to the insurance company. It is inferable that the amount was paid in settlement of a dispute and probably closed, cutting off any further right of either the defendant Osborne or the insurance company as against the other. I favor the allowance of this amount on the counterclaim, to its reduction at the time of the rendering of judgment, and before the allowance of said counterclaim in reduction of plaintiff's mortgage. If the respondent so stipulates, the judgment as so modified should be affirmed, without costs to either party

of this appeal. If such stipulation is not given, the judgment should be reversed and a new trial granted, costs to abide the event. Woodward, J., concurs.

THE ADIRONDACK TRUST COMPANY, Respondent, v. THE NABOB CONSOLIDATED MINING COMPANY and STEWART MINING COMPANY, Appellants.— Orders affirmed, with costs. All concur, except Kiley, J., dissenting.

THE ADIRONDACK TRUST COMPANY, Respondent, v. THE NABOB CONSOLIDATED MINING COMPANY and STEWART MINING COMPANY, Appellants.— Order affirmed, with costs. All concur, except Kiley, J., dissenting.

MULVENA BERKOWITZ, Appellant, v. HARRY B. ROSEN, Respondent.— Judgment and order unanimously affirmed, with costs.

CONTINENTAL INSURANCE COMPANY, Appellant, v. MYRON C. WOOD, as Administrator, etc., of NATHANIEL W. CARMAN, Deceased, Appellant.— Judgment and order affirmed, with costs, under section 1317 of the Code of Civil Procedure. All concur, except Woodward and Kiley, JJ., dissenting.

ADDISON GOODRICH, Respondent, v. ARTHUR W. GOODRICH, Appellant.— Judgment unanimously affirmed, with costs.

HUBERT KELLY, Respondent, v. HOME MUTUAL FIRE INSURANCE COMPANY OF BROOME COUNTY, N. Y., Appellant.— Order unanimously affirmed, with ten dollars costs and disbursements.

In the Matter of the Charges against WILLIAM J. CUNNINGHAM, Fire Battalion Chief, Appellant. COMMISSIONER OF PUBLIC SAFETY OF THE CITY OF TROY, New York, Respondent.— Order unanimously affirmed, with ten dollars costs and disbursements.

In the Matter of the Application and Petition of JOHN F. GALVIN and Others, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of The City of New York, Respondent, under Chapter 724 of the Laws of 1905, and the Acts Amendatory Thereof, in the Towns of Gilboa and Conesville, County of Schoharie; Roxbury, County of Delaware; and Prattsville, County of Greene, in the State of New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York. CHESTER A. PLATNER, Claimant, Appellant.— Order affirmed, with ten dollars costs and disbursements. All concur, except Cochrane, J., dissenting.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of GEORGE HABBERSHAW, Respondent, for Compensation under the Workmen's Compensation Law, v. SHEPARD COMPANY, Employer. Defendant, and THE HARTFORD ACCIDENT AND INDEMNITY COMPANY, Insurance Carrier, Appellant.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by FRED CLARK, Respondent, v. ERIE RAILROAD COMPANY, Employer, Appellant.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by Mrs. TILLIE SCHWABE, Widow, Respondent, on Account of the

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Death of HERMAN SCHWABE, v. A. M. HAZELL, INC., Employer, and EMPLOYERS' MUTUAL INSURANCE COMPANY OF NEW YORK, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of JOSEPH SAXON, Respondent, for Compensation under the Workmen's Compensation Law, v. JOHN LITTLE, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of LAMBERT J. ECKERT, Respondent, for Compensation under the Workmen's Compensation Law, v. A. P. W. PAPER COMPANY, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ROSA FULD, Respondent, for Compensation under the Workmen's Compensation Law, v. SIGMUND SOLOMON CO., Employer, and THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of NICHOLAS MARTIN, Respondent, for Compensation under the Workmen's Compensation Law, v. CRAIG & VROOMAN, Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ALBERT MEYERS, Respondent, for Compensation under the Workmen's Compensation Law, v. SYDNEY K. JOHNSON, Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award modified by deducting therefrom \$150, and as modified affirmed. All concur, except Van Kirk, J., who votes for affirmance without modification.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK CENTRAL RAILROAD COMPANY AND ERIE RAILROAD COMPANY v. PUBLIC SERVICE COMMISSION, SECOND DISTRICT, PENNSYLVANIA RAILROAD COMPANY AND DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY. (Proceeding to Revoke Certificate of Convenience and Necessity Issued to the Frontier Electric Railway Company.) THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK CENTRAL RAILROAD COMPANY AND ERIE RAILROAD COMPANY v. PUBLIC SERVICE COMMISSION, SECOND DISTRICT, PENNSYLVANIA RAILROAD COMPANY AND DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY. (Proceeding by Pennsylvania Railroad Company and Delaware, Lackawanna and Western Railroad Company to Acquire the Capital Stock of the Frontier Electric Railway Company.)—Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK CENTRAL RAILROAD COMPANY, Relator, v. PUBLIC SERVICE COMMISSION, SECOND DISTRICT, Defendant.—Motion denied.

CALVIN P. PRESCOTT and ARTHUR W. PRESCOTT, Copartners Doing

Business under the Firm Name and Style of **PRESCOTT SUPPLY COMPANY**, Respondents, v. **M. WILLIAM PROBST**, Appellant.—Order unanimously affirmed, with ten dollars costs and disbursements.

**HELEN ROBERTSON**, Respondent, v. **EARL ROBERTSON**, Appellant.—Order unanimously affirmed, with ten dollars costs and disbursements.

**DAVID C. TAYLOR**, Respondent, v. **IRINE K. EMBURY**, Appellant.—Motions denied.

**SUSAN THOMPSON**, Appellant, Respondent, v. **FORT MILLER PULP AND PAPER COMPANY**, Appellant, Respondent.—Motion denied.

**LOUISE P. TRUEBIG** and **WILHELMINA P. GOEBEL**, Respondents, v. **GEORGE C. GOEBEL** and Others. **GEORGE C. GOEBEL**, Appellant.—Motion denied. Van Kirk, J., not sitting.

**THOMAS WATTS V. MAXWELL BURTIS**.—Motion granted by default.

**MIKE MAYERSAK**, Appellant, v. **MERRILL H. CLEVELAND**, Respondent.—Motion granted, with ten dollars costs.

Before **STATE INDUSTRIAL COMMISSION**, Respondent. In the Matter of the Claim of **MEYER LEDERSON**, Respondent, for Himself, for Injuries Sustained, under the Workmen's Compensation Law, v. **CASSIDY & DORFMAN**, Employer, and **ROYAL INDEMNITY COMPANY**, Insurer, Appellants.—Decision amended so as to read as follows: Award reversed, and matter remitted to the Commission for its further consideration. Opinion by John M. Kellogg, P. J. All concur, except Kiley, J., dissenting, with a memorandum. [Reported in 195 App. Div. 613.]

Before **STATE INDUSTRIAL COMMISSION**, Respondent. In the Matter of the Claim of **GRACE DELSO** and Others, Respondents, for Compensation under the Workmen's Compensation Law, v. **CRUCIBLE STEEL COMPANY OF AMERICA**, Employer and Self-Insurer, Appellant.—Motion denied.

Before **STATE INDUSTRIAL COMMISSION**, Respondent. In the Matter of the Claim of **PETER NERONSKY**, Respondent, for Compensation under the Workmen's Compensation Law, v. **COLUMBIAN ROPE COMPANY**, Employer, and **AMERICAN MUTUAL LIABILITY INSURANCE COMPANY**, Insurance Carrier, Appellants.—Award unanimously affirmed.

**NEWARK CHEESE CO., INC.**, Appellant, v. **MASONVILLE CREAMERY COMPANY, INC.**, Respondent.—Judgment unanimously affirmed, without costs of this appeal to either party. This court makes the following additional finding and modifications of findings of the trial court: In the last week of October, 1919, when the \$2,000 note was given, it was agreed between the plaintiff and the defendant that the retaining of the note should be without waiving any rights on the part of the defendant under the contract, and that no more milk would be delivered by the defendant to the plaintiff until said note was paid; that said note should be paid within two or three days, and it was not so paid, and was not paid prior to November 1, 1919; that said note was not accepted in payment of the debt then due, but as collateral security for the said indebtedness. The fifth finding of fact of the trial court is modified by adding the words "and for payments due prior thereto." The sixth finding of fact of the trial court is modified by adding the words "and for milk delivered prior to October, 1919." The

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seventh finding of fact of the trial court is modified by striking out the words "for which plaintiff's note had been given and endorsed by its treasurer, individually." The eleventh finding of fact of the trial court is modified to read as follows: "*Eleventh.* That it was not intended by defendant to waive prompt payment pursuant to the terms of the contract as to the milk thereafter delivered, which fact was made known to the plaintiff by the defendant's representative during the last week of October, 1919, at the interview between the plaintiff's treasurer and the defendant's representative in New York city."

Petition of the NEW YORK CENTRAL RAILROAD COMPANY, Respondent, under Section 91 of the Railroad Law,\* for an Order Determining that the Crossing at Grade in the City of Kingston, of Cornell Street, and the West Shore Railroad Company (Lessor) Shall Be Closed and Discontinued, and a New Piece of Street Be Constructed to Manor Avenue. UNITED STATES LACE CURTAIN MILLS, Appellant.—Order unanimously affirmed, with costs.

VILLAGE OF NEW PALTZ, Respondent, v. NEW PALTZ, HIGHLAND AND POUGHKEEPSIE TRACTION COMPANY, Appellant.—Motion denied.

AARON POCKROSE and Others, Respondents, v. ISRAEL SHAPIRO, Appellant.—Order unanimously affirmed, with ten dollars costs and disbursements.

GEORGE L. PATTERSON, Respondent, v. WILLA C. PATTERSON, Wife of GEORGE L. PATTERSON, and Others, Defendants. JOHN D. SCHOONMAKER, Appellant.—Order unanimously affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. UNITED STATES RUBBER COMPANY, Appellant, v. WALTER H. KNAPP and Others, Constituting the State Tax Commission of the State of New York, Respondents.—Determination confirmed, with fifty dollars costs and disbursements. All concur, except Kiley, J., dissenting; Van Kirk, J., not sitting.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOHN HANKARD, Appellant.—Judgment of conviction and order unanimously affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. THOMAS CORBETT, Appellant.—Judgment unanimously affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EMELINE F. CLYDE, Relator, v. JAMES A. WENDELL, as Comptroller of the State of New York, Respondent.—Determination confirmed, with fifty dollars costs and disbursements. All concur, except John M. Kellogg, P. J., dissenting.

ELVER L. RICE, Doing Business under the Firm Name and Style of AMERICAN STANDARD JEWELRY COMPANY, Respondent, v. VENUS LEEDER, Appellant.—Judgment unanimously affirmed, with costs.

GEORGE WILLIAM BEACH, Appellant, v. A. BARTON HEPBURN, as Treasurer of SERBIAN CHILD WELFARE ASSOCIATION OF AMERICA, Respondent.—Order unanimously affirmed, with ten dollars costs and disbursements.

FARMERS SYNDICATE, INC., Appellant, v. F. KIESER & SON CO., INC.,

\* Amd. by Laws of 1914, chap. 378.—[Rep.]



and KASCO MILLS, INC., Respondents.— Order unanimously affirmed, with ten dollars costs and disbursements.

FARMERS SYNDICATE, INC., Appellant, v. F. KIESER & SON CO., INC., Respondent.— Order unanimously affirmed, with ten dollars costs and disbursements.

WILLIAM F. MILLER, Appellant, v. SAKS & COMPANY, a Corporation, Respondent.— Order unanimously affirmed, with ten dollars costs and disbursements.

LEVI PUTMAN, Respondent, v. WILLIAM J. ADAMS, Appellant.— Order unanimously affirmed, with ten dollars costs and disbursements.

ALICE CHASE, as Administratrix, etc., of LELAND H. CHASE, Deceased, Appellant, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Respondent.— Order unanimously affirmed, with costs.

MARTIN CRIPPEN and FRED CRIPPEN, Respondents, v. JULIA CALLAHAN, Appellant.— Judgment and orders unanimously affirmed, with costs.

MAUDE H. C. DAVIS, Respondent, v. WILLIAM H. DAVIS, Appellant.— Motion denied.

F. KIESER & SON CO., INC., Respondent, v. CHAUTAUGUA COUNTY FARMERS MILK PRODUCERS ASSOCIATION, Appellant.— Order unanimously affirmed, with ten dollars costs and disbursements.

ELMER E. KNIGHT, Respondent, v. SHERMAN BROWN and HATTIE BROWN, Appellants.— Motion granted.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MRS. SHERMAN JOHNSON and LENA MAY JOHNSON, Respondents, for Compensation under the Workmen's Compensation Law for the Death of EARL SCHRYBER, v. ENDICOTT-JOHNSON CORPORATION, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by MRS. ANNA C. THORPE, Respondent, for Compensation to Herself, for the Death of CLIFFORD E. THORPE, Her Son, v. J. W. HOOK, Employer, and THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of WILLIAM FLANAGAN, Respondent, for Compensation under the Workmen's Compensation Law, v. JONES BROTHERS, Employer, and THE COMMERCIAL CASUALTY INSURANCE COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of HARRY RIVER, Respondent, for Compensation under the Workmen's Compensation Law, v. PRUSSACK ELECTRIC CO., Employer, and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE CO., LTD., Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by LEO T. WALSH, Respondent, v. THE AMERICAN MACHINE AND

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FOUNDRY COMPANY, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of SENECA HOWARD THRESHER, Father of FRANK R. THRESHER, Deceased, Respondent, v. AMERICAN BRIDGE COMPANY, Employer and Self-Insurer, Appellant.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of JOHN MOYLAN, Respondent, for Compensation under the Workmen's Compensation Law, v. ACME BURLAP BAG COMPANY, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation of RAFFAELLO PICUILLO, Respondent, v. THE JESSOPH CO., INC., Employer, and THE EMPLOYERS MUTUAL INSURANCE COMPANY OF NEW YORK, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of FRANCIS B. MURRAY, Brother, Respondent, for Compensation under the Workmen's Compensation Law, for the Death of ANNA V. MURRAY, v. P. F. COLLIER & SON COMPANY, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by RICHARD J. MCGOWAN, Respondent, v. H. E. TAYLOR & Co., Employer, and ALLIED MUTUALS LIABILITY INSURANCE Co., Insurance Carrier, Appellants.—Award reversed and matter remitted to the Commission on the ground that the compensation exceeding the sum of \$250, the same should be paid to the estate instead of the widow. All concur.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by JOSEPH CHIMERO, Respondent, on Account of the Death of DOMENICK CHIMERO, Deceased, v. STANDARD CHARCOAL COMPANY, Employer, and MANUFACTURERS' LIABILITY INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of CHARLES T. GREENLAND, Father, and CORA A. GREENLAND, Mother, Respondents, for Compensation under the Workmen's Compensation Law, for the Death of HAROLD GREENLAND, Deceased, v. C. E. MILLS OIL COMPANY, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of HAZEL LEON and Others, Respondents, for Compensation under the Workmen's Compensation Law, v. GILBERT KNITTING Co., Employer, and UTICA MUTUAL INSURANCE COMPANY, Insurance Carrier, Appellants.—Awards unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter

of the Claim for Compensation under the Workmen's Compensation Law, Made by AKSEL EMIL REINHARDT, Respondent, v. NEWPORT FLYING SERVICE CORPORATION, Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of BERTHA SCHOLTZHAUER, Dependent Mother, and Dependent Sisters, Respondents, on Account of the Death of IRMA DALE SCHOLTZHAUER, for Compensation under the Workmen's Compensation Law, v. C. & L. LUNCH COMPANY, Employer, and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LTD., Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ELIZABETH O'SULLIVAN, Respondent, for Compensation under the Workmen's Compensation Law, for the Death of FLORENCE O'SULLIVAN, Deceased, v. A. H. WOODS THEATRE COMPANY, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.—Motion denied.

JAMES MCPHILLIPS, Respondent, v. NEW YORK TELEPHONE COMPANY, Appellant.—Motion denied.

KADY MATERSAK, Appellant, v. MERRILL H. CLEVELAND, Respondent.—Motion granted, with ten dollars costs.

THOMAS V. McMANUS, Appellant, v. CHARLES VAN DUZER, Respondent.—Motion granted, with ten dollars costs, unless the appellant, within sixty days, perfects the appeal, and pays such costs, in which case motion is denied, without costs.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by HENRY QUICK, Respondent, v. THE FRED E. ILLSTON ICE COMPANY, Employer, and ICE DEALERS MUTUAL INSURANCE COMPANY, Insurance Carrier, Appellants.—Motion denied.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by ANNA McCLOSKEY, Widow, Respondent, for Herself and Infant Children, on Account of the Death of DANIEL McCLOSKEY, Deceased, v. RICHARD HELLMANN, INC., Employer, and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LTD., Insurance Carrier, Appellants.—Motion denied.

NEW PALTZ, HIGHLAND AND POUGHKEEPSIE TRACTION COMPANY, Appellant, v. ALBERT H. MARTIN, Individually and as Tax Collector of the Town of Lloyd, Ulster County, New York, Respondent.—Order unanimously affirmed, with ten dollars costs and disbursements.

THE NATIONAL COMMERCIAL BANK AND TRUST COMPANY OF ALBANY, as Successor Trustee under the Mortgage Described in the Complaint Herein, Respondent, v. THE KNICKERBOCKER BREWING CORPORATION and THE KNICKERBOCKER PRODUCTS CORPORATION, Defendants. WILLIAM E. WOOLLARD and ANTHONY ENGESSER, Appellants; CHARLES F. MURRAY, Referee to Sell, and HOWARD HENDRICKSON, Chairman of the Knicker-

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bocker Brewing Corporation Bondholders Protective Committee, Purchaser at Sale Had in the Above Entitled Action, Respondents.— Order unanimously affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. HARLEY S. FOSGATE, Appellant.— Judgment of conviction affirmed; the court considering that if there was any error in the admission of the testimony of Torrey it could not have affected the result. All concur, except Kiley, J., who dissents on the ground that the admission in evidence of the testimony of Torrey, clerk of the town board, as to the statements made by the supervisor at a meeting of the board, when the defendant was not present, was error.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. E. H. MILLER v. GEORGE C. VAN TUYL, JR., and Others.— Application denied.\*

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In the Matter of the Construction of the Last Will and Testament of OSCAR W. BUMP, Deceased. GUARANTY TRUST COMPANY OF NEW YORK, as Executor, etc., and Others, Appellants; GERTRUDE M. BUMP, Individually and as Administratrix, etc., Respondent.— Paragraphs first and fourth of the decree reversed, with separate bills of costs to each of the parties appearing upon this appeal by separate attorneys and filing briefs, including the special guardian, payable out of the corpus of the estate, and matter remitted to the Surrogate's Court for further proceedings in accordance with this decision and for fixing the compensation of the special guardian for his services, to be paid out of the corpus of the estate. Held, this court holds and decides that as to the corpus of the estate of Oscar W. Bump, deceased, his will speaks as of the date of the death of the surviving sister, Gertrude M. Bump, and not as of the date of the death of his widow, Ethalaide Bump, nor as of the date of his death; and this court further holds and decides that what remains of the corpus of the estate undisposed of at the death of the surviving sister, Gertrude M. Bump, passes to a class of persons to be ascertained at the death of said Gertrude M. Bump answering the description of heirs at law and next of kin of the said testator as if he had died at that time, and the same should be distributed accordingly. All concur, except Clark, J., who dissents and votes for affirmance, and Lambert, J., not voting.

JOHN JOHNSON CONSTRUCTION Co., Appellant, v. CITY OF JAMESTOWN, Respondent.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, with leave to the defendant to plead over within twenty days, upon payment of the costs of the motion and of this appeal. Held, that the statement in the complaint, "That such agreement on the part of the city was made and accepted by such commission for the purpose of providing against delays in the work of any contractor undertaking such improvement and for his benefit," was a state-

\* For additional decisions of this term, see *post*, p. 929.—[REP.]

ment of fact or a conclusion of fact and not a conclusion of law, and as such was admitted by the demurrer. (*Spies v. Munroe*, 35 App. Div. 527; *Rochester R. Co. v. Robinson*, 133 N. Y. 242; *Sultan of Turkey v. Tiryakian*, 213 id. 429.) The questions of whether or not the agreement made between the city and the State was made for the benefit of the plaintiff, and if so made, whether or not it entitled the plaintiff to recover, should be determined upon the trial. All concur.

FRANK L. PAGE, Respondent, v. NELSON ADAMS and Others, Appellants.— Judgment affirmed, with costs. All concur.

CHARLES H. ADDINGTON, as Trustee of the MARVEL OIL BURNER COMPANY, INC., a Bankrupt, Respondent, v. FORSYTH METAL GOODS COMPANY, Appellant.— Judgment and orders affirmed, with costs. All concur.

THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant, v. THE PEOPLE OF THE STATE OF NEW YORK and Others, Respondents.— Judgment affirmed, with costs. All concur.

In the Matter of the Final Judicial Settlement of the Accounts of NELSON A. ECKLER and Others, as Administrators, etc., of ISABELLA L. PECK, Deceased.— Decree and order affirmed, with separate bills of costs to each of the respondents appearing upon this appeal by separate attorneys and filing brief, payable out of the estate. All concur.

ABEL R. MULDER, Respondent, v. U. S. SLICING MACHINE COMPANY and Another, Appellants.— Judgment and order affirmed, with costs. All concur.

GLENN W. WOODIN, as Trustee in Bankruptcy of the Estate of STANLEY F. NOWAK, etc., Respondent, v. STANLEY F. NOWAK, Otherwise Known, etc., and Others, Appellants.— Judgment affirmed, with costs. All concur.

JONATHAN B. MENNIG, as Administrator, etc., Plaintiff, v. LOUIS G. SCHOEFFLIN, as Sole Executor, etc., and Others, Defendants.— Judgment directed as demanded by the plaintiff in the submission, but under the stipulation, without costs. All concur.

MARY DE HART and Others, Appellants, v. GEORGE V. FORMAN and Others, Respondents.— Order affirmed, with costs. All concur, Kruse, P. J., not sitting.

MARY DE HART and Others, Appellants, v. GEORGE V. FORMAN and Others, Respondents.— Judgment affirmed, with costs. All concur, Kruse, P. J., not sitting.

WILLIAM FITZGIBBONS, Respondent, v. THOMAS BOEPPLE, Appellant.— Judgment and order affirmed, with costs. All concur, except Davis, J., who dissents upon the grounds: *First*. That the verdict is contrary to and against the weight of the evidence. *Second*. That there is no sufficient evidence to establish the plaintiff's adverse possession of the triangular piece of land in question, or of the practical location by the parties of a boundary line claimed by the plaintiff. *Third*. That the trial court erred in rejecting the evidence of ancient maps made by persons indifferent between the parties, and well-authenticated copies of such maps, and the proof offered that the plaintiff had not paid the water frontage tax on the lands claimed by adverse possession. *Fourth*. That it is unjust and inequitable to take from the defendant lands that will deprive him of a frontage of at

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least sixty feet, to which he is entitled by occupation and under deeds of record for over sixty years. *Fifth.* That there was no evidence upon which the jury could find \$100 damages for the use of the small parcel of property in dispute.

EDYTH S. BEANE, Appellant, v. CHARLES G. MADER, Respondent.— Judgment and order affirmed, with costs. All concur, Clark, J., not sitting.

PATRICK O'MALLEY, Respondent, v. EUGENE T. PARKES, Appellant.— Judgment and order affirmed, with costs. All concur.

MARTHA E. HUNTER, Appellant, v. JOHN BARTON PAYNE, as Director-General of Railroads, etc., Respondent.— Judgment and order affirmed, with costs. All concur, Davis, J., not sitting.

JOHN C. KEEFE, Appellant, v. FRANK B. PARKER, Respondent.— Order reversed and judgment of Justice's Court affirmed, with costs to plaintiff in this court and in the County Court. Held, the evidence in Justice's Court was sufficient to establish that the plaintiff was the holder of an equitable assignment of a portion of the fund of one Lewis Shimer in the hands of the defendant, and that there was a sufficient amount due from the defendant to Shimer applicable to the payment of the plaintiff's claim; and that plaintiff was entitled to recover from the defendant the amount of the order. The defendant was present at the trial and had opportunity to defend on the merits had he wished. He elected to stand on purely technical rights; and in cases arising in Justice's Court, where the record is rarely complete and suits are for small amounts, and the trials are usually conducted without the aid of skilled counsel, the courts will not favor highly technical defenses where the merits in favor of the prevailing party are manifest. All concur.

FIRST NATIONAL BANK OF CALEDONIA, Respondent, v. ESBARY FIRE-PROOFING AND GYPSUM BLOCK COMPANY, Appellant.— Judgment reversed and complaint dismissed, with costs. The findings of fact contained in the decision and numbered VI, VII, IX, X, XI, XII, XIII and XIV are reversed and stricken out as being immaterial, and the findings of fact contained in defendant's requests to find and numbered fourth and seventh are found by this court; and this court further holds and decides that the plaintiff cannot maintain this action to recover possession of the personal property mentioned in the complaint or the value of such property. It is bound by the superior title of the defendant established by the judgment in the foreclosure action, to which the plaintiff was a party. The remedy of the plaintiff must be sought by an action on the contract it claims to have made with the defendant to sell the property on execution sale and to be paid its reasonable expenses incurred thereby. All concur, except Lambert, J., not voting.

JAMES L. BYRNES, Respondent, v. GEORGE H. LYON, Appellant.— Judgment and order affirmed, with costs. All concur.

THE J. M. & L. A. OSBORN COMPANY, Respondent, v. JOHN C. KENNEDY, Appellant.— Judgment and order affirmed, with costs. All concur.

EARL J. BROOMFIELD, Respondent, v. FRANK NEFF, Appellant.— Judgment and order affirmed, with costs. All concur.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. FRANK O'HARA, Alias "HUNG" O'HARA, Appellant.— Judgment of conviction affirmed. All concur.

HERBERT S. SISSON, as State Commissioner of Excise of the State of New York, Respondent, v. LEO H. GEISE, Appellant.— Order affirmed, with costs. All concur, except Lambert and Clark, JJ., who dissent.

In the Matter of the Appointment of a Committee on Character and Fitness of Applicants for Admission to the Bar in the Seventh Judicial District.— Hon. Arthur E. Sutherland appointed a member of said committee in the place of Joseph W. Taylor, resigned.

In the Matter of the Application of WILLIAM JONES for the Removal of ALFRED COCOMITROS from Certain Premises in the City of Watertown.— [See *post*, p. 925.] Motion granted and appeal dismissed, with costs.

MICHAEL LUKACIEWICZ, Respondent, v. HEDWIGE RUCZYNSKI, Appellant.— Motion to dismiss appeal granted, unless appellant shall file and serve printed papers by May twelfth.

ELEANOR M. CONLEY, Respondent, v. JOSEPH J. LUGIA and Others, Appellants.— Motion granted and appeal dismissed, with costs.

AMERICAN FIELD STORAGE CORPORATION, Appellant, v. JOSEPH C. TRAUTMAN, Respondent.— Motion to dismiss appeal denied.

REUBEN BRAUMSTEIN and Another, Respondents, v. JACOB SIEGEL and Another, Appellants.— Motion to dismiss appeal denied, and case put over present term, upon condition that appellants shall pay to respondent's attorney ten dollars and be ready to argue the appeal at the opening of the September term.

JAMES HEALY, SR., Respondent, v. MAGNUS P. BENZING and Another, Appellants.— Appeal dismissed, without costs, upon stipulation filed.

JAMES HEALY, JR., an Infant, etc., Respondent, v. COLE MOTOR COMPANY OF BUFFALO, Appellant.— Appeal dismissed, without costs, upon stipulation filed.

CALVIN G. SUTLIFF and Another, Respondents, v. BENFORD AUTO PRODUCTS COMPANY, INC., Appellant.— Appeal dismissed, without costs, upon stipulation filed.

HENRY WILLIS, as a Stockholder in the Rochester Electric Railway Company, on Behalf of Himself, etc., Respondent, v. CITY OF ROCHESTER, Appellant, Impleaded with Others, Defendants.— Appeal discontinued, without costs, upon stipulation filed.

GEORGE H. MILGATE, Plaintiff, v. HARRY OLIVER RITZ, Defendant.— Appeal dismissed, without costs, upon stipulation filed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. BUFFALO CONSISTORY OF SUBLIME PRINCES OF THE ROYAL SECRET OF THE VALLEY, ETC., Appellant, v. WILLIAM J. BURKE and Others, as Assessors of the City of Buffalo, Respondents. (Assessment of 1916.) — Appeal dismissed, without costs, upon stipulation filed.

NEW YORK CENTRAL RAILROAD COMPANY, Appellant, v. LOCK CITY DEVELOPING COMPANY, INC., Respondent.— Appeal dismissed, without costs, upon stipulation filed.

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STEPHEN V. LINES, Appellant, v. WILLIAM H. LINES, Respondent.— Motion granted and appeal dismissed, with costs.

JOHN M. PFAUDLER, Appellant, v. THE PFAUDLER COMPANY, Respondent.— Motion granted and appeal dismissed, with costs.

DOMINICK TACALANO, Respondent, v. GRANITE STATE FIRE INSURANCE COMPANY, Appellant.— Judgment and order affirmed, with costs. All concur, except Hubbs, J., not voting.

JOSEPH M. KERTZ, Respondent, v. J. N. ADAM & Co., Appellant.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. Held, that the Special Term correctly decided that the commissioner of public works had authority under section 271 of the old charter of the city of Buffalo (Laws of 1891, chap. 105)\* to grant the license set out in the defendant's answer. (*Hoey v. Gilroy*, 129 N. Y. 132.) It was in error, however, when it held that under the new charter (Laws of 1914, chap. 217) there was no authority vested in the city to grant such a license. Section 40 of the new charter vests in the council all the authority in that respect which was vested in the commissioner of public works under the old charter. The ordinance† permitting the granting of licenses for signs over public streets was in force when the new charter took effect and such ordinance was not in conflict with the new charter and the ordinance was, therefore, continued as a valid ordinance by subdivision 11 of section 13 of title 2 of the new commission charter. Evidently the attention of the Special Term was not called to section 40 of the new charter. We do not mean to hold that the mere fact that a valid license existed for the maintenance of the sign in question constituted a bar to this action, if the sign was maintained or used in a negligent manner. All concur.

In the Matter of the Application of HENRY P. STAMLER, Respondent, for a Writ of Mandamus against GRAPHIC ARTS COMPANY, Appellant, etc.— Order affirmed, with costs. All concur.

JAMES O. SEBRING, Respondent, v. GEORGE R. GRAVES, as Trustee of MARION C. GRAVES, Appellant, Impleaded with Others.— Order reversed and motion denied, but under the circumstances, without costs. Held, that in view of the denial and allegations contained in the answer, which is verified, the court erred in striking out the answer as sham upon affidavits controverting the allegations of the answer. All concur.

AMERICAN KARDEX COMPANY, INC., Respondent, v. AMERICAN CENTRAL COMMITTEE FOR RUSSIAN RELIEF, INC., Appellant.— Order affirmed, with ten dollars costs and disbursements. All concur.

HARRY C. WRIGHT, Respondent, v. NEW YORK CANNERS, INC., Appellant.— Order affirmed, with ten dollars costs and disbursements. All concur.

GLOBE ELEVATOR COMPANY, Respondent, v. THE AMERICAN MOLASSES COMPANY OF NEW YORK, Appellant.— Order modified so as to state more definitely the matters concerning which the examination is to be had, and

\* Amd. by Laws of 1910, chap. 643.— [REP.]

† See Buffalo Ordinances, chap. 4, § 32.— [REP.]



date for examination fixed for May 23, 1921, and as so modified affirmed, without costs of this appeal to either party. Held, that the moving affidavits, read in connection with the complaint and answer, are sufficient to show that the examination of the witness Mason and the taking of his deposition are material and necessary to the plaintiff to avoid a defense which has been set up, which, if unanswered and established would destroy the plaintiff's cause of action; and are, therefore, necessary to the plaintiff's cause of action. All concur.

J. JOSEPH MCGINN and Another, as Copartners, etc., under the Firm Name and Style of GENESEE PRECISION TOOL & DIE COMPANY, Respondents, v. GENERAL FUEL SAVING CORPORATION, Appellant.— Order affirmed, with ten dollars costs and disbursements. All concur.

CAROLINE WILKS, as Administratrix, etc., Respondent, v. NEW YORK TELEPHONE COMPANY, Appellant, Impleaded with Another.— Order affirmed, with ten dollars costs and disbursements. All concur.

DONNER STEEL COMPANY, Appellant, v. QUEEN CITY FOUNDRY COMPANY, INC., Respondent.— Judgment and order affirmed, with costs. Held, that the correspondence upon which appellant relies to make out a contract fails to show a meeting of minds. All concur.

HORACE S. VAN PATTEN, Respondent, v. WILLARD H. BUNDY, Appellant.— Judgment affirmed, with costs. All concur.

CHRISTINA REESE, Respondent, v. NELSON T. BARRETT, Appellant.— Judgment and order affirmed, with costs. All concur.

GEORGE N. POLITIKAS, Respondent, v. CHARLES F. JOHNS and RAYMOND T. MALLERY, as Sheriff of Cattaraugus County, Appellants.— Judgment and order affirmed, with costs. All concur.

CHARLES GORNBEIN, Respondent, v. NEW HAMPSHIRE FIRE INSURANCE COMPANY, Appellant.— Judgment and order affirmed, with costs. All concur.

NICHOLAS D. PETERS and Others, Doing Business as N. D. PETERS & Co., Appellants, v. LOUISE ADAMS, Respondent.— Judgment affirmed, with costs. All concur.

MINNIE H. BRESIEN, as Administratrix, etc., Respondent, v. NEW YORK CENTRAL RAILROAD COMPANY and Another, Appellants.— Judgment and order affirmed, with costs. All concur.

SADAE J. WAZEN, Respondent, v. ROSE DUGGAN, Appellant, Impleaded with MAR NE TRUST COMPANY, Defendant.— Judgment and order affirmed, with costs. All concur.

In the Matter of the Application of HENRY W. GRANT, Appellant, for the Removal of FRED McCONNELL, Respondent, from Certain Premises.— Judgment of County Court reversed, and final order of justice of the peace affirmed, with costs in this court and in the County Court to the petitioner. Held, that whether or not the parties agreed to an extension of the lease, and if so, for how long a period, was a question of fact, and the justice's decision to the effect that the extension was for one year only was supported by sufficient evidence and was not against the weight of the evidence. All concur.

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LOUIS NEWMAN, Respondent, v. G. H. POPPENBERG'S, INC., Appellant.— Judgment affirmed, with costs. All concur.

ANNA CARUSO, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.— Judgment and order affirmed, with costs. All concur.

GUISEPPE CARUSO, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.— Judgment and order affirmed, with costs. All concur.

In the Matter of the Joint Petition of the TOWN OF CUBA and THE BOARD OF SUPERVISORS OF THE COUNTY OF ALLEGANY, under Section 91 of the Railroad Law.\* — Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

MARTIN T. WILLIAMSON, Respondent, v. CHARLES SALMON, Appellant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

MICHAEL NOON, Respondent, v. WALKER D. HINES, as Director-General of Railroads, Appellant.— Motion for reargument denied, with ten dollars costs.

UTICA PAINT & GLASS COMPANY, INC., Respondent, v. CHARLES H. YATES, Appellant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

ANTHONY BUSCAGLIA and Others, Respondents, v. WILLIAM A. CAMP and Another, Appellants.— Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

MARY MCGLENN, as Administratrix, etc., Respondent, v. PENNSYLVANIA RAILROAD COMPANY and Others, Appellants.— Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

CHARLES SCHULTZ, Respondent, v. NIAGARA STEEL FINISHING COMPANY and Others, Appellants.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

WILLIAM G. KILHOFFER and Another, as Executors, etc., Respondents, v. WALBURGA ZEIS and Others, Appellants.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

LOUISE E. BURKART, Respondent, v. ORLANDO ADAMS, Appellant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

GRANBY PULP AND PAPER COMPANY, Respondent, v. CITY OF FULTON, Appellant.— Motion to amend order entered November 19, 1919, granted, and certain additional findings modified, conclusions of law stricken out and new conclusions of law made.

MARTHA BURKE, Respondent, v. IDA KIEKEBUSCH, Appellant, Impleaded, etc.— Motion for stay pending appeal denied, without prejudice to an application at the Trial Term for a stay or postponement of the trial.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JADY KELLY, Appellant.— Motion to have appeal heard upon typewritten minutes of the stenographer, without printing, denied.

VINCENT STONE COMPANY, Respondent, v. THE STATE OF NEW YORK, Appellant.— Appeal dismissed, without costs, upon stipulation filed.

\* Amd. by Laws of 1914, chap. 378. See 196 App. Div. 917.—[REp.]

GEORGE H. SPITZLI, Respondent, v. FRANK B. GUTH and MARY GUTH, Appellants.— Appeal dismissed, without costs, upon stipulation filed.

MARION E. WALDRON, Respondent, v. WILLIAM STEVENS and ELMER BERRY, Appellants.— Appeal dismissed, without costs, upon stipulation filed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOHN BARBIERI, Appellant.— Appeal dismissed upon stipulation filed.

WEAVER HARDWARE COMPANY, Respondent, v. MAX SOLOMNOVITZ and Others, Appellants.— Motion to dismiss appeal taken by George H. Stalker and Max Solomnovitz denied, and case put over term, to be argued at opening of September term.

LAURA RUBIN SUCKLE, Appellant, v. HYMAN GORDON and Another, Respondents.— Motion to dismiss appeal denied, upon condition that appellant file and serve printed papers on appeal within thirty days after decision by Sawyer, J., of motion now pending in case of *Frankel v. Rubin* [115 Misc. Rep. 566], and pay to respondents' attorney ten dollars.

THE STERLING ENGINE COMPANY, Respondent, v. ALFRED W. CHURCH and Others, Appellants.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. The referee is to be appointed by the Special Term in case the parties fail to agree upon a referee. Held, that the case is referable under section 1013 of the Code of Civil Procedure. (*Irving v. Irving*, 90 Hun, 422; *affd.*, 149 N. Y. 573; *Boisnot v. Wilson*, 95 App. Div. 489.) All concur.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FRANK D. WOOD, as Overseer of the Poor, Respondent, v. ALFRED PESCHKA, Appellant.— Judgment affirmed. All concur.

In the Matter of the Judicial Settlement of the Accounts of WILLIAM G. MUENCH, as Administrator, etc., of J. GEORGE BAUSINGER, Deceased, Respondent. ALEXIS N. MUENCH and Another, as Executors, etc., Appellants; LIZZIE BAUSINGER, Respondent.— Decree affirmed, with costs. All concur.

GROVER C. CONWAY, Respondent, v. WILLIAM STEADMAN, Appellant.— Judgment affirmed, with costs. All concur.

RICHARD C. BLASE, Respondent, v. NEW YORK STATE RAILWAYS, Respondent, and I. REED THOMSON, Appellant.— Judgment and order affirmed, with costs. All concur.

ERNEST B. PRENTISS, Respondent, v. DIRECTOR-GENERAL OF RAILROADS, Appellant.— Judgment and order affirmed, with costs. All concur.

ROSAMOND GIFFORD, Respondent, v. THE FIRST TRUST AND DEPOSIT COMPANY (Formerly Named THE TRUST AND DEPOSIT COMPANY OF ONONDAGA), as Executor, etc., Appellant.— Judgment affirmed, with costs. All concur.

ELIZA JANE SPERRIN, Respondent, v. FRANCIS C. ERNSHAW, Appellant, Impleaded with Others.— Judgment affirmed, with costs. All concur.

EUGENE E. DUDLEY, Respondent, v. GEORGE BULLOCK, as Receiver of the BUFFALO AND LAKE ERIE TRACTION COMPANY, Appellant.— Judgment and order affirmed, with costs. All concur.

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LELAND A. COLTON, Respondent, v. LAWRENCE R. RYCKMAN, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs to abide event. All concur.

WILLIAM ORTMAN, by SARAH G. ORTMAN, His Guardian ad Litem, Respondent, v. LOUIS SUKERNER, JR., Appellant.— Judgment and order affirmed, with costs. All concur.

CHRISTOPHER W. MCGUIRE, an Incompetent Person, etc., Respondent, v. ALBERT MCGUIRE and Another, Appellants.— Judgment affirmed, with costs. All concur.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CALERGO GIAMBELLUCA, Appellant.— Judgment of conviction and order affirmed. All concur.

LEON BROTHERS, INC., Respondent, v. WILLIAM M. BARRETT, as President of the ADAMS EXPRESS COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. All concur.

MARY HARRIET WILSON, Appellant, v. HERBERT E. RICHARDSON, as Executor, etc., and Others, Respondents.— Motion granted and appeal dismissed, with costs.

In the Matter of the Probate of the Last Will and Testament of WILLIAM JOHNSON, Deceased.— Motion granted and appeal dismissed, with costs.

FRANK NASHEK, Appellant, v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., Respondent.— Appeal dismissed, without costs, upon stipulation filed.

HARRY L. ALLEN, as Trustee, etc., Appellant, v. HELEN STONE, Respondent, and Thirty-nine Other Actions Brought by the Same Plaintiff against Separate Defendants.— Motion for reargument denied. Motion to amend decision denied. Motion for leave to appeal to Court of Appeals denied.

In the Matter of the Intermediate Judicial Settlement of the Accounts of SECURITY TRUST COMPANY, as Executor, etc., of JAMES G. ARDREY, Deceased.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

WEED & COMPANY, Respondent, v. LEHIGH VALLEY RAILROAD COMPANY, Appellant.— Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

ABEL R. MULDER, Respondent, v. UNITED STATES SLICING MACHINE COMPANY and Others, Appellants.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

GLENN W. WOODIN, as Trustee, etc., Respondent, v. STANLEY F. NOWAK and Others, Appellants.— Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

In the Matter of the Application of WILLIAM JONES for the Removal of ALFRED COCOMITPOS from Certain Premises.— [See *ante*, p. 920.] Order of dismissal vacated and case restored to calendar upon stipulation filed.

J. PETER WIRTH, Respondent, v. HARRY E. RISING, Appellant.— Appeal dismissed unless appellant is ready for argument on May eighteenth.

GRANGER & COMPANY and Others, Respondents, v. CHARLES W. FINK and Others, Appellants.— Appeal dismissed unless appellants shall file and

serve printed papers and briefs by July first and pay to respondents' attorney ten dollars.

**GRANGER & COMPANY and Others, Respondents, v. EUGENE BURNS and Others, Appellants.**—Appeal dismissed unless appellants shall file and serve printed papers and briefs by July first.

In the Matter of **ROBERT W. FARRINGTON**, an Attorney and Counselor at Law.—Issues raised by the petition and answer referred to Hon. William M. Ross, official referee, to take the proofs thereon and report the same to this court with his opinion.

**PETER STAUFER, Appellant, v. DEO BRASTED, Respondent.**—Motion to dismiss appeal denied, without costs.

**WEED & COMPANY, Respondent, v. WILLIAMS BUSINESS EXCHANGE, INC., Appellant.**—Appeal dismissed unless appellant shall file and serve printed papers and pay to respondent's attorney ten dollars within thirty days.

**MARGARET A. YOUNG and Another, Respondents, v. AMERICAN CENTRAL INSURANCE COMPANY OF ST. LOUIS, MISSOURI, Appellant.** **MARGARET A. YOUNG and Another, Respondents, v. SENECA FIRE INSURANCE COMPANY, Appellant.**—In each case order entered May 21, 1920, amended so as to reverse final judgment only.

**MARY PECK, Appellant, v. WILLIAM PECK, Respondent.**—Order reversed with ten dollars costs and disbursements, and matter remitted to the Special Term for further proceedings. Held, that in view of the demand for judgment contained in the complaint, respecting the custody of the children and the provisions of section 1771 of the Code of Civil Procedure, the trial court was authorized to make provision for the support and maintenance of the children. **Kruse, P. J., Lambert, Hubbs and Davis, JJ., concur.** **Clark, J., not sitting.**

In the Matter of the Application of the **CITY OF NIAGARA FALLS, Respondent, for the Acquisition of Land for the Establishment of a City Park** **LENA E. ZENK, Appellant.**—Order affirmed, with costs. All concur.

**CLARA ANDREWS HALE and Another, Respondents, v. MICHAEL H. RIPTON, Appellant.**—Judgment and order affirmed, with costs. All concur.

In the Matter of the Judicial Settlement of the Accounts of **FIDELITY TRUST COMPANY OF BUFFALO and EDWARD W. HAMILTON, as Executors of the Estate of LUCY T. PLIMPTON, Deceased.** **FIDELITY TRUST COMPANY OF BUFFALO, as Executor, etc., Appellant; EDWARD W. HAMILTON, as Executor, etc., Respondent.**—Decree modified and as so modified affirmed, without costs of this appeal to either party. Held, where an executor who is a lawyer seeks to charge for legal services in addition to his fees as executor,\* such services and the value thereof should be shown by clear and convincing evidence, apart from such as are administrative. The hypothetical question upon which the opinion of the lawyers as to the value of the legal services is based, covers services of both kinds, and it is difficult to tell upon what particular services such opinion is founded. We

\* See Code Civ. Proc. § 2753.—[REP.]

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are of opinion that \$5,000 is ample compensation for all of the services rendered and that the allowance made by the surrogate should be reduced accordingly. All concur.

SARAH CASPAR, as Administratrix, etc., Respondent, v. LEON T. BROWN, Appellant.— Judgment and order affirmed, with costs. All concur.

PENNSYLVANIA WOOD AND IRON COMPANY, Respondent, v. NEW YORK CAR WHEEL COMPANY, Appellant.— Judgment and order affirmed, with costs. All concur.

In the Matter of the Application of SOUTH BUFFALO RAILWAY COMPANY, Respondent, for Leave to Construct Its Road in, upon and across Lakeview Avenue in the Town of Hamburg, New York. SUPERINTENDENT OF HIGHWAYS OF THE TOWN OF HAMBURG, Appellant.— Order affirmed, with costs. All concur.

ANNA CZAJKA, as Administratrix, etc., Appellant, v. LEHIGH VALLEY RAILROAD COMPANY, Respondent.— Judgment affirmed, with costs. All concur.

In the Matter of the Arbitration of the Differences between DEXTER M. DRAKE, Respondent, and OSCAR C. TARBOX, Appellant.— Judgment and order affirmed, with costs. All concur.

CLARENCE W. PARKINSON, Respondent, v. J. I. CASE THRESHING MACHINE COMPANY, Appellant.— Judgment affirmed, with costs. All concur.

FRANK E. TYLER, Respondent, v. IDA M. GORDON, Individually and as Executrix, etc., Appellant.— Interlocutory judgment reversed, with costs, and demurrer sustained, with costs, with leave to the plaintiff to plead over within twenty days, upon payment of the costs of the demurrer and of this appeal. Held, that the plaintiff has improperly united in his complaint several causes of action, not arising out of the same transaction, some being legal and some being equitable in their nature, and calling for different kinds of relief,\* although an attempt is made in the complaint to have an accounting on the several causes of action set up therein. The second, third, fourth, fifth and sixth causes of action do not state facts sufficient therein to constitute a cause of action. All concur.

INDEPENDENT-KOENIG BREWING COMPANY, Respondent, v. NEW YORK STATE RAILWAYS, Appellant.— Judgment affirmed, with costs. All concur.

KENNERLY SMOKELESS COAL COMPANY, Appellant, v. SYLVANUS J. MACY and Another, Copartners, etc., Respondents.— Judgment and order affirmed, with costs. All concur.

REPUBLIC PACKING CORPORATION, Respondent, v. JOHN BARTON PAYNE, as Director-General of Railroads, etc., Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to the defendant to plead over within twenty days upon payment of the costs of the motion and of this appeal. All concur.

CHARLES A. FINNEGAN, Respondent, v. GEORGE S. BUCK and Others, as and Constituting THE COUNCIL OF THE CITY OF BUFFALO, Appellants.— Judgment affirmed, with costs. All concur.

\* See Code Civ. Proc. §§ 484, 488.—[REp.]

WILLIAM H. REXFORD, Respondent, v. CHAUNCEY FRAZIER, Appellant.— Judgment affirmed, with costs. Held, while we are of the opinion that a judgment for the delivery of an undivided one-half of some of the property in question cannot be sustained, yet in view of the fact that the property has been sold, as appears by statement made upon the argument, and the avails thereof are in the hands of the constable, for distribution, we think the judgment may properly be affirmed. All concur.

In the Matter of the Judicial Settlement of the Accounts of JAMES W. EGAN, as Executor, etc., of HANNAH EGAN MURPHY, Deceased.— Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

CHARLES A. FINNEGAN, Respondent, v. GEORGE S. BUCK and Others, as and Constituting THE COUNCIL OF THE CITY OF BUFFALO, Appellants.— Motion for leave to appeal to Court of Appeals granted.

In the Matter of the Probate of the Last Will and Testament of WILLIAM JOHNSON, Deceased.— Appeal dismissed, without costs, upon stipulation filed.

COCHRAN BOX AND MANUFACTURING COMPANY, Respondent, v. MONROE BINDER BOARD COMPANY, Appellant.— Motion for leave to appeal to Court of Appeals granted, and questions for review certified.

HENRY B. WEBER, Plaintiff, v. THE STATE OF NEW YORK, Defendant.— Appeal dismissed, without costs, upon stipulation filed.

WILLIAM A. MANOR, Respondent, v. CITY OF OSWEGO, Appellant.— Motion to dismiss appeal granted, unless appellant shall file and serve printed papers and briefs and pay to respondent's attorney ten dollars by July first.

HYDRAULIC POWER COMPANY OF NIAGARA FALLS, Respondent, v. PETTEBONE-CATARACT PAPER COMPANY, Appellant. HYDRAULIC POWER COMPANY OF NIAGARA FALLS, Respondent, v. CATARACT CITY MILLING COMPANY, Appellant.— Motion to dismiss appeals granted, unless appellants shall file and serve briefs by July first.

SPENCER KELLOGG & SONS, INC., Respondent, v. HUDSON TRADING COMPANY, Appellant.— Motion for stay pending appeal denied, without prejudice to an application at the Trial Term for a stay or postponement of the trial.

J. PETER WIRTH, Respondent, v. HARRY E. RISING, Appellant.— Motion granted and appeal dismissed, with costs.

NELLIE WHITMER, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.— Order affirmed, with costs. All concur.

GEORGE E. WHITMER, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.— Order affirmed, with costs. All concur.

JOSEPH B. MANG, Respondent, v. JOHN M. HOLLAND and Another, Appellants.— Judgment and order affirmed, with costs. All concur.

In the Matter of the Application of BIRNEY CLARK, for a Writ of Certiorari, to Review the Action of the MAYOR OF THE CITY OF FULTON.— Application denied, as a matter of law and not in the exercise of any discretion. Held, that a writ of certiorari does not lie to review the action of the mayor.

App. Div.]

First Department, June, 1921.

ARTHUR L. VAN ETTEN and MEDERIC TRUDEAU, Respondents, v. SPHINK HOLDING CORPORATION, Appellant, Impleaded with WALTER C. LAIDLAW and ROBERT A. LAIDLAW, Copartners, Doing Business under the Firm Name of SPENCER LUMBER COMPANY, and Others, Respondents. CHARLES M. HIRSCHFELDER and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements, upon the opinion of Stephens, J., delivered at Special Term. [Reported in 114 Misc. Rep. 436.] All concur.

### THIRD DEPARTMENT, MAY, 1921.\*

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HARRY B. WEATHERWAX, Respondent, v. JAMES R. WATT, as Mayor of the City of Albany, Appellant. *Mandamus*—when writ will issue to require enforcement of Transportation Corporations Law, § 26.†

Appeal from an order of the Supreme Court, entered in the Albany county clerk's office April 16, 1921, granting an application for a peremptory writ of mandamus.

PER CURIAM: The court is clearly of the opinion that the persons operating the vehicles in question are guilty of a crime. It is equally clear that it is the duty of the mayor to take care that the law against the commission of such crimes is executed and enforced, which up to the present time he has refused to do. The able and comprehensive opinion of Mr. Justice Hinman at Special Term renders further discussion unnecessary. [Reported in 115 Misc. Rep. 120.] Order unanimously affirmed, with costs.

### FIRST DEPARTMENT, JUNE, 1921.

HARRY LIPSHITZ, as Administrator, etc., Respondent, v. RICHARD FITZPATRICK, INC., Appellant, Impleaded with Another.

*Master and servant*—permission to appeal to Court of Appeals granted.

Motion by the defendant for leave to appeal to the Court of Appeals from a judgment entered upon an order of the Appellate Division affirming a judgment of the Supreme Court, New York county, and an order denying a motion for a new trial. [See 196 App. Div. 940.]

PER CURIAM: The troublesome question involved in this case, namely, who is the master, and so responsible for the negligence of the servant,

\* For other decisions of this term, see *ante*, p. 901.

† Added by Laws of 1915, chap. 667, as amd. by Laws of 1919, chap. 307.—[REp.]



under the doctrine of *respondent superior*, has not yet been so settled as to remove a particular case from the realm of uncertainty. The motion for reargument is denied, and the application for leave to appeal to the Court of Appeals granted. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ. Motion for leave appeal granted.

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MORRIS & COMPANY, Respondent, v. THE SOUTHERN EXPRESS COMPANY, Appellant.

*Pleadings — separate causes of action should be separately stated and numbered.*

Appeal from an order of the Supreme Court, entered in the New York county clerk's office April 6, 1921, denying defendant's motion to compel service of an amended complaint separately stating and numbering causes of action.

PER CURIAM: As the complaint alleges different shipments from different points on different dates, each shipment must have been evidenced by a bill of lading under the Interstate Commerce Law and the Federal Bill of Lading Law,\* and hence each shipment would be, under the contract, evidenced by the bill of lading and give rise to a separate cause of action. The order is, therefore, reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ. Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

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In the Matter of the Application of THE PEOPLE OF THE STATE OF NEW YORK, by JESSE S. PHILLIPS, as Superintendent of Insurance, Appellant, for an Order to Take Possession of the Property and Liquidate the Business of the CASUALTY COMPANY OF AMERICA. In the Matter of the Claim of CLAUDE M. BADGLEY, Respondent, Miscellaneous Claim No. 1.— Order affirmed with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MICHAEL MEADE, an Infant, by WINNIE MEADE, His Guardian ad Litem, Respondent, v. MOTOR HAULAGE Co., INC., Appellant, Impleaded with Another.— Judgment and order reversed and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered to the sum of \$20,112.20; in which event the judgment as so modified and the order appealed from are affirmed, without costs, on the authority of *Charles v. Barrett* [ante, p. 584], handed down herewith. Settle order on notice. Present — Dowling, Laughlin, Smith, Merrell and Greenbaum, JJ.

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\* See Interstate Commerce Act (24 U. S. Stat. at Large, 386), § 20, as amd. by 34 id. 593, 595, § 7; 38 id. 1196, 1197, chap. 176, and 39 id. 441, 442, chap. 301; Federal Bills of Lading Act, being 39 U. S. Stat. at Large, 538, chap. 415.— [REP.]

App. Div.]

First Department, June, 1921.

**HORACE H. GALLO**, Respondent, v. **ISIDOR FELDBAUM** and Another, Copartners, etc., Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ. Clarke, P. J., dissenting.

**MIRIAM BROMBERGER** and Another, Respondents, v. **THE SUN AND NEWS PUBLISHING COMPANY**, Appellant, Impleaded with Another.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**ALFRED B. ADAMS** and Another, Respondents, v. **MARCELLUS HARTLEY DODGE** and **SAMUEL F. PRYOR**, Conducting or Heretofore Conducting Business under the Name of the **REMINGTON ARMS-UNION METALLIC CARTRIDGE COMPANY**, Appellants.— Order reversed and motion granted on payment of full costs of action to date to be taxed, and with leave to plaintiff if so advised to discontinue without costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**ALFRED B. ADAMS** and Others, Respondents, v. **MARCELLUS HARTLEY DODGE** and **SAMUEL F. PRYOR**, Conducting or Heretofore Conducting Business under the Name of the **REMINGTON ARMS-UNION METALLIC CARTRIDGE COMPANY**, Appellants.— Appeal dismissed,<sup>3</sup> with ten dollars costs and disbursements to respondents. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**PHENIX CHEESE COMPANY**, Respondent, v. **JUTZ-PFLUKE PACKING COMPANY**, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ. Merrell, J., dissenting.

**NADAY & FLEISCHER, INC.**, Respondent, v. **CHARLES M. GOLDBERG**, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, on the ground that plaintiff has not made out a sufficiently clear case to warrant the granting of a temporary injunction, and without determining the merits of the action in advance of trial. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**NADAY & FLEISCHER, INC.**, Appellant, v. **CHARLES M. GOLDBERG**, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

In the Matter of the Petition of **LEON ISRAEL & BROS., INC.**, Respondent, for an Order Directing that the Arbitration Provided for in the Certain Contract in Writing Entered into between Said Petitioner and **MINT PRODUCTS COMPANY, INC.**, Appellant, Dated June 19, 1920, Proceed Pursuant to the Provisions of Said Contract and of the Arbitration Law of the State of New York.\*—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

\* See Consol. Laws, chap. 72; Laws of 1920, chap. 275. Since amd. by Laws of 1921, chap. 14.—[REP.]

CATHERINE PARRY, Respondent, v. GEORGE C. MOXON, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

PAUL WHITCOMB, Respondent, v. MATILDA WEISBECKER and Others, Individually and as Executors and Trustees, etc., Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

AUGUST E. STEFFEN, Suing on Behalf of Himself and of Other Stockholders etc., Appellant, v. WILLITE ROAD CONSTRUCTION COMPANY OF NEW YORK, INC., and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

BENJAMIN C. EMANUEL, as Administrator, etc., of JOSEPH GROPPER, Deceased, Respondent, v. METH & GROPPER Co., INC., and Others, Appellants, Impleaded with Others.— Order affirmed, with ten dollars costs and disbursements; the date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

IDA C. IMANDT, Respondent, v. EMIL B. IMANDT, Appellant.— Order modified by striking out provision for counsel fee and by reducing alimony to thirty dollars per week, and as so modified affirmed, without costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

HELEN PASCH, Respondent, v. GEORGE W. THOMPSON, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted upon payment by defendant of taxable costs to date of motion and ten dollars costs of motion. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

JULIA PASCH, Respondent, v. GEORGE W. THOMPSON, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted upon payment by defendant of taxable costs to date of motion and ten dollars costs of motion. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

GRACE H. CASSIDY, Appellant, v. ABNER W. CASSIDY, Respondent.— Order affirmed, without costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

GAILLARD REALTY Co., INC., Respondent, v. FRANCO ELECTRIC CORPORATION, Defendant, Impleaded with FRANCO REALTY CORPORATION, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

JOSEPHINE PARK TEARLE, Appellant, Respondent, v. CONWAY TEARLE, Respondent, Appellant.— Order affirmed, without costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

LOUIS B. CHRISTMAN, Respondent, v. UNION RAILWAY COMPANY OF THE CITY OF NEW YORK, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

App. Div.]

First Department, June, 1921.

**BERNARD MCSWEENEY, an Infant, by BERNARD E. MCSWEENEY and Another, His Guardians ad Litem, Respondent, v. UNION RAILWAY COMPANY OF THE CITY OF NEW YORK, Appellant.**—Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

In the Matter of the Probate of the Last Will and Testament of **FRANCIS H. ROSS, Deceased. EDWIN ROSS and Others, Appellants; ANDREW J. EWALD and Another, Executors, etc., and Another, Respondents.**—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK v. WILLIAM KEYS.**—Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**ANNIE SCHALL v. S. MONDAY & SONS.**—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**CHARLES SCHALL, an Infant, etc., v. S. MONDAY & SONS.**—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**MARGARET CURRAN, as Administratrix, etc., v. OLD DOMINION STEAMSHIP COMPANY.**—Motion to dismiss appeal denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**STANISLAW JANDRUNEWICZ v. CORNWALL KAOLIN COMPANY.**—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**MARK EPMAN and Others v. ARTHUR M. COX and Others.**—Motion to dismiss appeal denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

In the Matter of **KNICKERBOCKER LIFE INSURANCE COMPANY. THE PEOPLE OF THE STATE OF NEW YORK v. KNICKERBOCKER LIFE INSURANCE COMPANY.**—Motion to dismiss appeal denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**HERBERT BENSON, an Infant, etc., v. HENRY BEHLING.**—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**CAPITOL WOOLEN COMPANY, INC., v. THOMAS RUBIN.**—Motion to dismiss appeal granted, with ten dollars costs, unless appellant procure his points to be filed within ten days from service of order. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**FIREMEN'S MUTUAL BENEFIT ASSOCIATION OF THE CITY OF NEW YORK v. JAMES D. CLIFFORD.**—Motion to dismiss appeal denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

**DIRK BOER and Others v. MARCELINO GARCIA.**—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

WOODHOUSE, STOLL & COMPANY, INC., v. ROSSVILLE SILK MILLS COMPANY.—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

VICTOR E. MAYER v. ISIDOR BIERMAN and Others.—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

BIRD S. COLER, on Complaint of MARION SIDELL, v. JOHN A. CORCORAN.—Motion to dismiss appeal denied. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

HYMAN ROSENBERG v. PARKER SHEET METAL WORKS and Others.—Motion to dismiss appeal granted, with ten dollars costs, unless appellant comply with terms of order. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

EVELYN B. MACCONNELL v. ALICE MILLER.—Motion to dismiss appeal granted, with ten dollars costs, unless appellant comply with terms of order. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

JOSEPH COHEN v. MORRIS HORN, Impleaded, etc.—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

GEORGE C. HEIMERDINGER v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

WILLIAM H. BLACK and Others v. INEZ M. COUSINS.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

SYLVAN MORTGAGE COMPANY, INC., v. ALBERT M. STADLER.—Application granted. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

DAVID ROBSON v. NATHAN J. MILLER and Others.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

SOPHIA KADETZ v. CHARLES HARWOOD.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

HENRIETTA L. BOBBE and Others v. MASSACHUSETTS BONDING AND INSURANCE COMPANY.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

CUYLER REALTY COMPANY v. THE TENEO COMPANY, INC.—Motion for leave to appeal granted; motion for reargument denied. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

PENNSYLVANIA BRAKE BEAM COMPANY v. WILLIAM H. WALKER.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

MANDEL GOTTESMAN v. FURNESS, WITHEY & COMPANY, LTD.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

CENTRAL UNION TRUST COMPANY OF NEW YORK v. CAMILLE WEIDENFELD

and Others.— Motion denied, with ten dollars costs. Present — Clarke P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

In the Matter of SERVICE STREET, etc.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

BENJAMIN PITOFF v. WESTINGHOUSE, CHURCH, KERR & COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE PENNSYLVANIA RAILROAD COMPANY v. JOHN P. LEO and Others.— Motion granted. Question to be certified on settlement of order. Settle order on notice. Present — Dowling, Laughlin, Merrell and Greenbaum, JJ.

EUDORA S. VAN HORN v. FRANK M. VAN HORN, Impleaded, etc.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

UNITED STATES TRUST COMPANY OF NEW YORK and Others, as Trustees etc., v. JAMES G. BLAKE and Others.— Motion denied as being unnecessary. Under section 1336 of the Code of Civil Procedure, where final judgment is rendered in the court below after the refusal by the Appellate Division of a new trial upon an application made in the first instance at a term thereof, the party aggrieved may appeal directly from the final judgment to the Court of Appeals. The final determination of this court herein being in effect a modification of the judgment directed by the trial court, such appeal may be taken as of right. (Code Civ. Proc. § 190, subd. 1.) Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

MARY BURKE and Others v. NEW YORK UNIVERSITY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

LINDA MILLER v. PAUL PRAGER and Others.— Motion denied. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

MOODY ENGINEERING COMPANY, INC., v. CATALANA DE GAS ELECTRICIDAD, S. A.— Order resettled and filed. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

C. ITOH & COMPANY, LTD., v. BOYER OIL COMPANY, INC.— Motion granted and time to serve and file record on appeal extended thirty days from service of order. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

ARCHIBALD WILLIAMSON and Others v. UCHIDA TRADING COMPANY, LTD.— Stay pending appeal granted. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

ELIZABETH A. LEVY v. JESSE B. LEVY.— Orders filed. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

In the Matter of RALPH T. STANTON, an Attorney.— Reference ordered to Hon. John J. Freedman, official referee. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HENRY SHAPIRO and Another, Doing Business under the Name of HERBERT HECHT & Co., Respondents, v. KENMARE AUTO COMPANY, INC.,

Appellant.—Judgment and order affirmed, with costs. No opinion. Present — Dowling, Laughlin, Smith, Merrell and Greenbaum, JJ. Greenbaum, J., dissents. Dowling, J., dissents on the ground that the plaintiffs have failed to establish that they procured a customer who was financially able to enter into a lease or sublease of the premises in question.

GIDEON DAKIN, Respondent, v. BRUCE D. TITMAN and Another, Appellants.—Determination affirmed, with costs. No opinion. Present — Dowling, Laughlin, Smith, Merrell and Greenbaum, JJ.

HIS MAJESTY, KING OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND AND OF THE BRITISH DOMINIONS BEYOND THE SEA, EMPEROR OF INDIA, Respondent, v. MANNING, MAXWELL & MOORE, INC., Appellant.—Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term. No opinion. Present — Dowling, Laughlin, Smith, Merrell and Greenbaum, JJ. Smith, J., dissenting.

BRODSKY & SOVAK, INC., Respondent, v. FRANK BRODSKY and Another, Defendants, and KARL BYOIR, Appellant, Individually and as Copartners, etc.—Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term. No opinion. Present — Dowling, Laughlin, Smith, Merrell and Greenbaum, JJ.

ANNA MULLIGAN, Respondent, v. F. W. WOOLWORTH COMPANY, Appellant.—Judgment and order affirmed, with costs. No opinion. Present — Dowling, Laughlin, Smith, Merrell and Greenbaum, JJ.

IRA LESTER WOOD, Respondent, v. SAMSON D. OPPENHEIM and Others, Appellants.—Judgment affirmed, with costs. No opinion. Present — Dowling, Laughlin, Smith, Merrell and Greenbaum, JJ.

HERBERT R. SNYDER, Respondent, v. CHARLES PUTZEL, Appellant.—Order reversed and motion for new trial granted, with costs to appellant to abide event, on the ground that the verdict was against the weight of evidence. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ. Dowling and Merrell, JJ., dissenting.

HENRY YOOS, an Infant, by HENRY YOOS, His Guardian ad Litem, Respondent, v. THIRD AVENUE RAILWAY COMPANY, Appellant.—Judgment and order reversed and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered to the sum of \$12,151.60; in which event the judgment as so modified and the order appealed from are affirmed, without costs. No opinion. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

HENRY YOOS, Respondent, v. THIRD AVENUE RAILWAY COMPANY, Appellant.—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. GEORGE DISENA, Appellant.—Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

ALBERT HEYE, Respondent, v. AMERICAN CHEMICAL EDUCATION COMPANY, Impleaded with HARRIETT A. SCHREITER and Another, as Executrices.

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First Department, June, 1921.

etc., Appellants.— Order affirmed, with ten dollars costs and disbursements, with leave to defendants to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. SAMUEL HOLZMAN, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ. Clarke, P. J., and Merrell, J., dissenting.

FRANK S. TAGGART, Appellant, v. CUPRITE SULPHUR CORPORATION and Others, Respondents, Impleaded with Others.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

ALFRED F. LEOPOLD, Respondent, v. JAMES A. ALLISON, Appellant, Impleaded with Another.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

CHATHAM AND PHENIX NATIONAL BANK OF THE CITY OF NEW YORK, Respondent, v. SUGAR PRODUCTS COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and twenty dollars costs of motions at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

MOSES JACOBS, Respondent, v. THOMPSON-STARRETT COMPANY, INC., Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

VIRGINIA D. COSBY, Appellant, v. ARTHUR F. COSBY, Respondent.— Judgment affirmed, without costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

L. SAMUEL MANSON, Appellant, v. NEW YORK TIMES COMPANY, Respondent.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

MARY E. RILEY, Substituted as Plaintiff in the Place and Stead of DAVID LAWTON, Deceased, Appellant, v. JAMES MCGEE and Others, Respondents, Impleaded with JAMES LAWTON and Others, Appellants.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

CLARA L. SELDEN, as Committee, etc., of CLARENCE SELDEN, an Incompetent Person, Appellant, v. B. T. BABBIT, INC., Respondent.— Order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

WALTER BAUER, Appellant, v. AMERICAN CHICLE COMPANY, Respondent.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

HENRY BENNETT LEARY and Another, Copartners, etc., Respondents, v. STANISLAUS PETER MATTHEW CHARLES DE RIDDER, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.



**JULIUS KUPATT, Appellant, v. AMERICAN RAILWAY EXPRESS COMPANY, Respondent.**—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

In the Matter of Proving the Last Will and Testament of **FREDERICK GEBHARD, Deceased, as a Will of Real and Personal Property. FREDERICK GEBHARD, Appellant; VALENTINE GEBHARD, Respondent.**—Order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

**ANGELINE M. V. AUFIERO, Respondent, v. TERMINAL AND TOWN TAXI CORPORATION, Appellant.**—Judgment and order reversed and new trial ordered, with costs to appellant to abide event, upon the ground that the verdict is against the weight of the evidence on both issues of negligence. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

**MARY MURPHY, an Infant, by JANE MURPHY, Her Guardian ad Litem, Respondent, v. EIGHTH AVENUE RAILROAD COMPANY, Appellant.**—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ. Clarke, P. J., dissenting.

**GEORGE GILLMAN, Respondent, v. MORRIS SUDEKOV, Appellant.**—Judgment and order reversed and new trial ordered, with costs to appellant to abide event, on the ground that the verdict was against the weight of the evidence. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

**MARTHA KAMIONER KRAUS, Appellant, v. NATHANIEL KRAUS, Respondent.**—Judgment affirmed, without costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

**THE MOTION PICTURE TRADE DIRECTORY COMPANY, INC., Appellant, v. LAIRD H. WALLACE and Another, Individually and as Copartners, etc., Respondents.**—Determination affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ. Laughlin and Smith, JJ., dissenting.

**JOSEPH ZELENKO and Another, Copartners, etc., Respondents, v. MEYER NEUMANN, Doing Business under the Trade Name of MANHATTAN MAID DRESS Co., Appellant.**—Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and twenty dollars costs of motions at Special Term. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

In the Matter of the Appraisal under the Transfer Tax Law of the Estate of **MARY A. EARLY, Deceased. CHARLES M. EARLY, Individually and as Administrator, etc., and Another, Appellants; COMPTROLLER OF THE STATE OF NEW YORK, Respondent.**—Order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

**MARCUS EBERHART, Respondent, v. THE ROYAL BANK OF CANADA, Appellant.**—Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

**WILLIAM L. TUCKER, Appellant, v. CELESTINO PIVA, Respondent.**—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

**UNITED STATES PLYWOOD COMPANY, INC., Respondent, v. NATHAN**

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GOLDSMITH and Others, Constituting the Firm of L. GOLDSMITH & SON, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

S. CANDEL COMPANY, INC., Respondent, v. ABRAHAM RATKOWSKY, Appellant.—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

ESTHER BLUMENTHAL v. LOUIS SCHWARTZ.—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

EDWARD HAWREY, an Infant, etc., v. HERMAN BRAND, INC.—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ERNO BIRO v. NEW YORK HERALD COMPANY.—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MIHALY BREUER v. NEW YORK HERALD COMPANY.—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JACOB B. DAVIS v. JACOB FRIEDMAN and Others.—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of JAMES L. RANDOLPH, Deceased.—Motion to dismiss appeal denied, and deposit in lieu of undertaking and notice thereof permitted to be made and given *nunc pro tunc* as of date of filing notice of appeal. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

REBECCA WEIS and Others, as Executors, etc., v. MARC KLAU and Others, as Executors, etc.—Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ALICE R. SHEVLIN v. GEORGE A. SHEVLIN.—Motion to dismiss appeal granted. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of JOHN H. STREZLECKI, Deceased.—Motions to dismiss appeals granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

J. H. & C. K. EAGLE COMPANY, INC., v. HARRY STERNBERG.—Motion to dismiss appeal granted, with ten dollars costs, unless appellant comply with terms of order. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

WOODHOUSE, STOLL & COMPANY, INC., v. ROSSVILLE SILK MILLS COMPANY.—Motion granted and motion to dismiss appeal granted, with ten dollars costs, unless appellant comply with terms of order. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of LEON ISRAEL & BROS., INC., and MINT PRODUCTS COMPANY, INC.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ALONZO R. PECK and Others v. SAMUEL S. PECK and Others.—Motion

denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

BRONSON WINTHROP and Others, as Executors, etc., v. THE BANK FOR SAVINGS.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE STANDARD CASING COMPANY, INC., v. CALIFORNIA CASING COMPANY, INC.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

CHARLES G. MANDEVILLE v. COLLEGE OF THE CITY OF NEW YORK.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SAM ZWEIFLER v. PUBLIC BANK OF NEW YORK CITY, etc.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE SHERWOOD COMPANY v. OTTO VOLKENING.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ROY J. POMEROY v. NEW YORK HIPPODROME CORPORATION.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. KNUT HULTMAN and Others v. JOHN F. GILCHRIST, as Commissioner, etc.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HARRY LIPSHITZ, as Administrator, etc., v. NEW YORK STEAM COMPANY, INC.— Motion for reargument denied. Motion for leave to appeal granted. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

GEORGE NOCOLAIDES v. AMEDEE VUCCINO and Others.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

J. HARVEY FINCH v. L. B. FOSTER COMPANY, INC.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

CHARLES HALDANE v. NASH ROCKWOOD.— Motion granted. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SADIE ZASLAWSKY and Others, as Executors, etc., v. LOUIS SCHWARTZ.— Motion for stay granted. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JAMES B. YOUNG v. MAX HAHN.— Motion for stay pending appeal granted. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THOMAS D. KELLIHER v. O'BRIEN MORIARTY COMPANY, INC., and Others.— Motion denied. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SUCCESS WAIST COMPANY, INC., v. THE WIGWAM COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

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STELLA H. KEATING and Others v. EMMA S. HAMMERSTEIN, Individually and as Executrix, etc., and Others.— Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ROTARY SHIRT COMPANY v. ADOLPH GLUCK.— Motion dismissed, with ten dollars costs, and stay vacated. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of Proving the Last Will and Testament of SAMUEL TREMPER LONGMAN, Deceased, as a Will of Real and Personal Property. ROSE HELLMAN LONGMAN, Appellant; TREMPER LONGMAN, Executor, etc., and Another, Respondents.— Decree and order affirmed, with costs. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

WALTER FRANCIS DUKE, an Infant, by WILLIAM F. DUKE, His Guardian ad Litem, Respondent, v. ISRAEL KERNER, Appellant.— Judgment and order reversed and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce the judgment as entered to the sum of \$5,177.73; in which event the judgment as so modified and the order appealed from are affirmed, without costs. No opinion. Settle order on notice. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

In the Matter of the Arbitration between THE STANDARD KNITTING COMPANY, INC., Respondent, and BENJAMIN COHEN, Appellant.— Judgment and orders affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

HAROLD H. SEATON, Respondent, v. ALEXANDER McWHIRTER, Impleaded with HENRY WEISMANN, as Receiver of the UNION SHIP AND DOCK COMPANY, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

MUNSON G. SHAW and Others, Surviving Partners, etc., Respondents, v. MILTON MANUFACTURING COMPANY, LIMITED, a British Corporation, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ. Page and Greenbaum, JJ., dissenting.

MUNSON G. SHAW and Others, Surviving Partners, etc., Respondents, v. MILTON MANUFACTURING COMPANY, LIMITED, a British Corporation, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ. Page and Greenbaum, JJ., dissenting.

JEANNIE DUNLOP, Respondent, v. L. LAWRENCE WEBER and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE ENDERS SALES COMPANY, Respondent, v. A. C. PENN, INC., Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

KATHERINE J. MCGOVERN, Respondent, v. TRANSPORTES MARITIMOS DO ESTADO, Defendant. FEDERAL LINE, INC., Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THOMAS DE SIMONE, Respondent, v. TRANSPORTES MARITIMOS DO ESTADO, Defendant. FEDERAL LINE, INC., Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THOMAS DE SIMONE, Respondent, v. TRANSPORTES MARITIMOS DO ESTADO, Defendant. FEDERAL LINE, INC., Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE SUNSHINE CLOAK and SUIT COMPANY, Respondent, v. ABRAHAM SCHLOSSBERG and Others, Doing Business under the Name of THE SUNSHINE DRESS COMPANY, Appellants.— Order affirmed, with ten dollars costs and disbursements, and stay vacated. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SUSQUEHANNA STEAMSHIP COMPANY, INC., Respondent, v. A. O. ANDERSEN & COMPANY, INC., Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THOMAS D. KELLIHER, Respondent, v. O'BRIEN MORIARTY COMPANY, INC., Defendant, Impleaded with WILLIAM J. O'BRIEN and Another, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

NETTIE POLANSKY, Respondent, v. FRANK TUMA and Others, Appellants, Impleaded with Others.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

GUISTINO SALUSTO, Respondent, v. NORWICH PHARMACAL COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ. Smith and Greenbaum, JJ., dissenting.

JOSEPH L. BERGER and Others, Doing Business under the Firm Name and Style of BERGER, RAPHAEL & WILE, Respondents, v. SIDNEY HILLMAN, Individually and as General President of the AMALGAMATED CLOTHING WORKERS OF AMERICA, an Unincorporated Association, Appellant, Impleaded with Others.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MARKS ARNHEIM, INC., Respondent, v. SIDNEY HILLMAN, as General President of the AMALGAMATED CLOTHING WORKERS OF AMERICA, an Unincorporated Association, Appellant, Impleaded with Others.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ABRAHAM RUTH, Appellant, v. JOHN P. LEO and Others, Constituting the Board of Appeals Created by Chapter 503 of the Laws of 1916,\* Respondents.— Order affirmed, with

\* Adding to Greater New York Charter (Laws of 1901, chap. 466), § 718-d *et seq.*, as amd. by Laws of 1917, chap. 601.— [Rep.]

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ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

A. EUGENE AUSTIN, Appellant, v. CHARLES B. MANVILLE, Respondent, Impleaded with Another.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page, and Greenbaum, JJ.

EUGENE THALMESSINGER, Appellant, v. PINE RIDGE COAL COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

BANKERS TRUST COMPANY, Appellant, v. KINGS COUNTY TRUST COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

CHARLES N. BRISSE, Appellant, v. FREDERICK J. LISMAN and Others, as Copartners, etc., Respondents.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

TWENTY-TWO THAMES STREET CORPORATION, Respondent, v. JAMES HERBERT, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HENRY M. HOGAN, Respondent, v. NITROGEN ELECTRIC LAMP COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HORACE R. KELLY, Appellant, v. CHRISTIAN H. HILBERT, Respondent.— Order affirmed, with ten dollars costs and disbursements. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

INTERNATIONAL HIGH SPEED STEEL COMPANY, Appellant, v. CARAVEL COMPANY, Inc., Respondent.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ. Smith and Greenbaum, JJ., dissenting.

In the Matter of the Application of JOB E. HEDGES, as Receiver of the NEW YORK RAILWAYS COMPANY, Appellant, for a Writ of Mandamus against CHARLES L. CRAIG, as Comptroller of the City of New York, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

GUSSIE NAGEL, Respondent, v. ISIDORE NAGEL, Appellant.— Order modified by reducing alimony to \$75 per week and counsel fee to \$500, and as so modified affirmed, without costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of the Application of TITLE GUARANTEE AND TRUST COMPANY, as Executor and Trustee of and under the Last Will and Testament of

MARIA A. DEL RIO, Deceased, Respondent, for an Order Granting Leave to Said Executor to Compromise and Settle the Plaintiff's Claim in the Action of TITLE GUARANTEE AND TRUST COMPANY, as Executor, etc., Plaintiff, v. HERIBERTO LOBO and Others, Defendants. SECURITY TRUST COMPANY OF STROUDSBURG, Pa., as Guardian, etc., and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MAY GAMMANS, Appellant, v. NELSON GAMMANS, Respondent.—Order affirmed, without costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

PSAKI & CO., INC., Respondent, v. FRANCISCO DE LAS PENAS RODRIGUEZ, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HARRY DODDS, Respondent, v. ELIZABETH MCCOLGAN, as Executrix, etc., of JOHN MCCOLGAN, Deceased, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

H. B. LEVINE CO., INC., Appellant, v. LARRY J. MARGULIES, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ERNEST TRIBELHORN, Respondent, v. J. K. ESTATE REALTY CORPORATION, Appellant. (Appeal No. 3.) —Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ERNEST TRIBELHORN, Respondent, v. J. K. ESTATE REALTY CORPORATION, Appellant. (Appeal No. 4.) —Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HARRY V. BRITTON, Respondent, v. SEABOARD OIL CORPORATION, Appellant.—Order affirmed, with ten dollars costs and disbursements. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

GEORGE B. READ, Appellant, v. FRANCES ADELE CITRON, Also Known as FRANCES ADELE CARNOCHAN, Respondent.—Order modified as stated in order and as so modified affirmed. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, Respondent, v. JAMES D. CLIFFORD, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

FRED J. WAGNER TIRE AND RUBBER CO., INC., Appellant, v. DAYTON RUBBER MANUFACTURING COMPANY, Defendant. DAYTON RUBBER MANUFACTURING COMPANY OF DELAWARE, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

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NEUMAN LONDON, Respondent, v. SAMUEL OPPENHEIMER, Defendant, and MAX OPPENHEIMER, Appellant, Copartners, etc.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MAY OLMSTED, Appellant, v. CLARENCE E. OLMSTED, Respondent.— Order affirmed, without costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

PERCY C. SCHEUER and Another, Copartners, etc., Respondents, v. MILTON A. HERZIG, Appellant.— Order affirmed, with ten dollars costs and disbursements. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

TROPICAL TREE AND RUBBER CO., INC., Respondent, v. PIETRO ALVINO, Doing Business under the Style of A. ALVINO & FIGLIO, Appellant.— Order modified as stated in order and as so modified affirmed, with ten dollars costs and disbursements to appellant. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

BECKIE N. MUSHER, Respondent, v. THE TOWN OF LIVINGSTON, Appellant, Impleaded with Another.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MORRIS MUSHER, Respondent, v. THE TOWN OF LIVINGSTON, Appellant, Impleaded with Another.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MARIE E. HARTMANN, Respondent, v. OTTO R. HARTMANN, Appellant.— Order modified by reducing alimony to \$50 a week and counsel fee to \$250, and as so modified affirmed, without costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SIDNEY STEINER, Appellant, v. PERCY C. SCHEUER, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

FAY EISENBERG, Appellant, v. LESTER W. EISENBERG, Respondent.— Order affirmed, without costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

WILLIAM C. J. BARTELS, Respondent, v. WILLIAM R. HOPKINS and Another, Appellants, Impleaded with Another.— Order so far as appealed from reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ALFRED ORLIK, Respondent, v. WIENER BANK VERBIN, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of the Application of the CALIFORNIA ASSOCIATED RAISIN COMPANY for a Compulsory Accounting between CALIFORNIA ASSOCIATED RAISIN COMPANY, Appellant, and GOLDMEYER, THIEL & ARNOLD, INC.,

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Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MICHAEL W. CASEY, Respondent, v. SHULTS BREAD COMPANY and Another, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

EDMUNDO MONTEALEGRE and Another, Appellants, v. OLD DUTCH MILL, INC., Respondent.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SIMON GULACK, Respondent, v. ISAAC O. SCHRIF and Another, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ARNOLD C. HANSEN, Respondent, v. GREGORI BENENSON, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HYMAN MELTZER and Others, Respondents, v. HARRY FISHEL and Others, Appellants, Impleaded with Others.— Order modified as stated in order and as so modified affirmed, without costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of the Application of THE PEOPLE OF THE STATE OF NEW YORK, by WILLIAM T. EMMET, Superintendent of Insurance, Respondent, for an Order to Take Possession of the Property and Liquidate the Business of the EMPIRE STATE SURETY COMPANY. In the Matter of the Claim of UNITED STATES OF AMERICA, Appellant. Surety Claim No. 122.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ARCHIBALD WILLIAMSON and Others, Doing Business under the Firm Name of BALFOUR, WILLIAMSON & Co., Respondents, v. UCHIDA TRADING COMPANY, LIMITED, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. The date for the examination to proceed to be fixed in the order. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MAURICE VAN DUZER, Respondent, v. HAHLO COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

WILLIAM MILNE, Trustee of the Estate of JAMES READ SMITH, Deceased, Appellant, v. MARY D. YOUNG, Respondent.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of the Application of THE EQUITABLE TRUST COMPANY OF NEW YORK, Appellant, in Proceedings Supplementary to Execution and Return Thereof, against RUSSELL PALMER, Respondent. EMIL FEFFER-CORN, Third Party.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. No opinion.

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Order filed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MIDDLEBROOK, McDONALD & Co., INC., and Others, Respondents, v. FREDERICK K. MIDDLEBROOK, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

AMOS K. ASHBY and Another, Appellants, v. DE LA VERGNE MACHINE COMPANY, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

DELANCEY T. SMITH and Another, Respondents, v. WINDER E. GOLDSBOROUGH, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ. Greenbaum, J., dissents.

HANNAH BARNETT, Appellant, v. THE CITY OF NEW YORK, Respondent.— Judgment reversed and new trial ordered, with costs to appellant to abide the event, on the ground that the questions of defendant's negligence and the contributory negligence of the plaintiff should have been submitted to the jury. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

LEWIS BARNETT, Appellant, v. THE CITY OF NEW YORK, Respondent.— Judgment reversed and new trial ordered, with costs to appellant to abide event, for the reason assigned in *Barnett v. City of New York* (ante, p. 947), decided herewith. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HOLMES ELECTRIC PROTECTIVE COMPANY, Respondent, v. WILLIAM WILLIAMS, as Commissioner of Water Supply, Gas and Electricity, and Others, Appellants, Impleaded with Another.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

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IDA W. McDONOUGH, as Administratrix, etc., of JOHN J. McDONOUGH, Deceased, Respondent, v. STANDISH REALTY CORPORATION, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

FARNHAM REALTY CORPORATION, Appellant, v. HERMAN N. LIBERMAN, Respondent.— Order affirmed, with ten dollars costs and disbursements,

with leave to plaintiff to withdraw demurrer on payment of said costs and ten dollars costs of motion at Special Term. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE CITY OF NEW YORK, Respondent, v. BRIDGE OPERATING COMPANY, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ. Greenbaum, J., dissenting.

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LOUISA APPELL, Respondent, v. INTERBOROUGH RAPID TRANSIT COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

LOUISA APPELL, Respondent, v. INTERBOROUGH RAPID TRANSIT COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

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7. Foreign corporation is doing business in this State so that service of summons and complaint may be made on managing agent where agent had desk room in building in New York city for its agent, employed stenographer, had letterheads containing corporation's name with its home address and telephone listed in corporation's name — test is that enough be done to enable court to say corporation is doing business here. *Cochran Box & Mfg. Co., Inc., v. Monroe Binder Co.*, 221.

8. In action by non-resident against foreign corporation to recover purchase price of goods, contract will be deemed, for jurisdictional purposes, to have been made in New York, where it is shown that purchase and sale of goods mentioned were negotiated by brokers in city of New York and that the bought and sold notes were sent to parties, returned by them and exchanged by brokers in city of New York. *Pottash v. Cleveland-Akron Bag Co.*, 763.

9. Process — service of summons on secretary and treasurer while attending manufacturers' fair in this State good — defendant was doing business in this State at time of service, where two officials, during manufacturers' fair, occupied room in hotel, on door of which was placed sign bearing defendant's name and it appeared that orders were taken from jobbers in attendance at fair. *Bogert & Hopper, Inc., v. Wilder Mfg. Co.*, 773.

10. Foreign corporation is not doing business in this State within General Corporation Law, section 15, where order for goods was taken by firm of commission merchants in city of New York who represented number of foreign corporations; and plaintiff had nothing whatever to do with running of New York office, kept no books there nor any goods beyond samples. *Eagle Mfg. Co. v. Arkell & Douglas, Inc.*, 788.

**CORROBORATION.**

See CRIMES, 2.

**COSTS AND FEES.**

See, also, ATTORNEY AND CLIENT, 1-8; EXECUTORS AND ADMINISTRATORS, 3; HUSBAND AND WIFE, 3; PARTIES; REFERENCES.

**RIGHT TO COSTS.**

1. Taxable costs which defendant was required to pay as condition to amending his answer may be taxed again as costs against defendant on recovery of final judgment by plaintiff — motion costs paid on amendment may be deducted. *Hadjopoulos v. Manoussou*, No. 1, 53.

**TAXATION.**

2. Plaintiff is entitled under subdivision 4, section 3251, Code of Civil Procedure, to tax costs at thirty dollars for three terms where cause has appeared on Appellate Division calendar three terms, exclusive of term at which it was argued — expenditure for correction in printing appeal papers allowable — costs on appeal from order denying retaxation allowable. *Foster v. Halsey & Co.*, 121.

3. Plaintiff is entitled to costs though partly unsuccessful in ejectment action — defendant is not entitled to costs on separate issue relating to boundary line where she did not maintain her claim to a full boundary — equity rule as to costs not applicable where case is tried as an ejectment action. *McKay v. Nichols*, 246.

**COUNTERCLAIM.**

See DEPOSITIONS, 1; INSURANCE, 2; MORTGAGES, 4, 5; PLEADINGS, 10, 15; REFLEVIN; SALES, 5.

**COURT OF CLAIMS.****DISMISSAL OF CLAIM.**

Judgment entered upon dismissal of claim is one of nonsuit where no findings are made. *Deyoe v. State of New York*, 716.

**COURTS.**

*See, also, ATTORNEY AND CLIENT, 7; EMINENT DOMAIN; INJUNCTION, 8.*

**JURISDICTION.**

1. Service of summons by publication in suit in equity to have plaintiff declared equitable owner of policy of life insurance and to recover proceeds thereof does not give court jurisdiction of non-resident — action is not one *in rem*. *Schoenholz v. New York Life Ins. Co.*, 91.

2. There is no force in relator's contention in application for writ of habeas corpus to obtain possession of his child that similar proceedings in foreign State were deprived of their conclusive character by fact that guardian was not resident thereof and her appearance was voluntary. *Matter of Standish*, 176.

**COVENANTS.**

*See DEEDS, 2.*

**CRIMES.**

1. Carrying concealed weapon — judgment convicting defendant of crime of carrying loaded revolver concealed upon his person reversed and new trial granted where license had been duly issued to defendant and at time of arrest had not been revoked — failure to exhibit license is not basis for conviction under sections 1897 and 1898 of Penal Law, although it justifies arrest and is presumptive evidence of guilt. *People v. Stuyvesant*, 641.

2. Criminally receiving stolen property — thief is not accomplice of person receiving stolen property where theft is not induced by latter — corroboration of testimony of thief is not necessary. *People v. Kupperschmidt*, 675.

3. Disorderly conduct — under section 74 of Inferior Criminal Courts Act of City of New York, as amended, one who neglects adequately to provide for his wife or children, or neglects to provide for them according to his means, may be convicted as a disorderly person — separation pursuant to agreement providing for support of wife and child does not deprive court of jurisdiction — evidence insufficient to sustain conviction. *People v. Houtman*, 84.

4. Evidence — testimony by police officer as to statement made by complaining witness is hearsay in trial of another police officer for larceny committed while on duty — admission of evidence that complainant identified defendant was reversible error where weight of evidence was to effect that defendant was not person who robbed complainant — error not cured in admitting incompetent testimony on ground it would be stricken out if not connected where in fact it was not stricken out. *People v. Russell*, 239.

5. Grand larceny — on prosecution for grand larceny, first degree, evidence examined and held not to sustain conviction of police officer of crime committed while on duty. *People v. Russell*, 239.

6. Grand larceny — conspiracy between bailee and third person to sell property — defendant by procuring purchaser and participating in delivery became co-conspirator — larceny not complete until sale actually made — defendant not guilty of receiving stolen property. *People v. Romanelli*, 876.

[For tables containing all sections of the Penal Law and of the Code of Criminal Procedure cited and construed in this volume, see *ante*, p. lxi.]

**CRIMINALLY RECEIVING STOLEN PROPERTY.**

*See CRIMES, 2.*

**DAMAGES.**

*See, also, CONTRACTS, 6, 12; EMINENT DOMAIN; FRAUD; NEGLIGENCE, 4; SALES, 4, 13; TRIAL, 5; VILLAGES.*

**ASSESSMENT.**

Computation — where action is one in tort for unlawful interference with contract between plaintiff and third person, it is rightly referred to a referee to compute damages instead of profits. *Gonzales v. Kentucky Derby Co.*, 277.

**DECEDENTS' ESTATES.***See* EXECUTORS AND ADMINISTRATORS; TRUSTS; WILLS.**DEEDS.****CONSTRUCTION.**

1. Property conveyed — thread of stream is boundary line where deed describes boundary line as running to stream and thence down stream — adjoining landowners on non-navigable streams take title accretions in proportion to line on margin in part of upland according to straight lines drawn at right angles between sides of line on shore and center line of stream — accretions belong to uplands against which they are laid and ownership passes under deed to uplands under common law rule applicable in this State. *Cramer v. Perine*, 218.

2. Restrictive covenant not to build within stated number of feet from street — covenant not mutually restrictive — right of way granted in 1877 for persons, wagons and animals to be construed as of date when made — reservation does not include passage for large motor trucks — covenant not violated by constructing balcony over right-of-way eight feet above it. *Casella v. Gallo*, 825.

**DEEDS OF TRUST.***See* MORTGAGES, 1.**DEAD BODY.***See* CONTRACTS, 12.**DEATH.***See* EXECUTORS AND ADMINISTRATORS, 1.**DEFAULT.***See* HUSBAND AND WIFE, 7.**DEFENSES.***See* CONTRACTS, 9; HUSBAND AND WIFE, 7; INSURANCE, 2; LANDLORD AND TENANT, 1; PLEADINGS, 7, 13.**DEFINITIONS.***See* ACCOUNT STATED; MORTGAGES, 1.**DEMURRER.***See* MUNICIPAL CORPORATIONS, 11; PLEADINGS, 12, 13.**DENIALS.***See* PLEADINGS, 7, 8.**DEPOSITIONS.****EXAMINATION BEFORE TRIAL.**

1. An examination of plaintiff before trial will be denied where plaintiff is bound to prove all matters on which defendant can examine an examination will be denied as to counterclaim where issues have not been joined thereon. *Hansen v. Benenson*, 594.

**DEPOSITION TAKEN WITHOUT STATE.**

2. Deposition for plaintiff taken without State not signed by him and filed without notice one year after examination — motion to suppress within one month thereafter withdrawn by consent and presented to trial justice — deposition admitted on trial — after disagreement of jury question as to admissibility of deposition was before court — defendant not guilty of laches in moving to suppress deposition — deposition not admissible as it was not signed by him as required by Code of Civil Procedure, § 901, subd. 2. *McNally v. Chapin*, 792.

**DEPOSITS.***See* BANKS AND BANKING.**DISCIPLINARY PROCEEDINGS.***See* ATTORNEY AND CLIENT, 6, 7.**DISORDERLY CONDUCT.***See* CRIMES, 3.

**DISSOLUTION.**

*See* CORPORATIONS, 3.

**DOMESTIC RELATIONS.**

*See* HUSBAND AND WIFE.

**DURESS.**

*See* LANDLORD AND TENANT, 5.

**EASEMENTS.**

*See* DEEDS, 2.

**EJECTMENT.****INCIDENTAL PROCEEDINGS.**

1. Rule of *stare decisis* will be observed in construing colonial land grants — terms of colonial land grant construed to include land under bays and coves in Hudson river — grant not strictly construed, though to individual. *Starke-Belknap v. New York Central Railroad Co.*, 249.

**TRIAL.**

2. Verdict in ejectment action which does not specify estate in property recovered is not defective though informal — Code of Civil Procedure, section 1519, construed. *McKay v. Nichols*, 246.

**ELECTION OF REMEDIES.**

*See* WORKMEN'S COMPENSATION LAW, 1.

**ELEVATORS.**

*See* NUISANCE.

**EMINENT DOMAIN.****COMPENSATION.**

Measure and amount — in determining the value of property acquired by New York city for park purposes owner is entitled to have considered adaptability of property to purposes for which it could be most profitably used — damages cannot be based on speculative and fanciful plan of improvement, but evidence admitted thereon is not prejudicial where court disregarded it — court governed by same rules as were formerly applied to commissioners in condemnation — award to city based on testimony of experts called by corporation counsel. *Matter of City of New York (Inwood Hill Park)*, 431.

**ENABLING ACT.**

*See* STATE.

**EQUITABLE ASSIGNMENT.**

*See* ASSIGNMENTS.

**EQUITY.**

*See, also,* COSTS AND FEES, 3; INSURANCE, 4.

**MAXIMS.**

1. He who asks equity must do equity — where plaintiffs ask that acts of defendant performed with their consent shall be deemed acts for their benefit they should be required, as condition of being granted that equity, to concede to defendants equity of allowing them fair value for their work which inured to plaintiffs' advantage. *Moller v. Pickard*, 333.

**JURISDICTION.**

2. Equity has jurisdiction to proceed by injunction to prevent the continuing breach of contract in future and incidentally to award damages for past in action to restrain defendant from operating a game under agreement that lessor would not lease game to another — judgment should enjoin defendant in use of particular game only and should not extend to like or similar games. *Gonzales v. Kentucky Derby Co.*, 277.

**FRAUD.**

3. Suit to set aside deed and separation agreement on ground of fraud and duress — plaintiff's arrest and holding for grand jury prior



**EQUITY** — *Continued.*

to execution of deed and agreement not unlawful — facts show that plaintiff acted of his own free will in execution of instruments — failure to repudiate deed and agreement for two years precludes claim of execution under fraud and duress. *Fowler v. Fowler*, 572.

**ACCOUNTING.**

4. Statute of Frauds is not defense in suit to establish trust and accounting where there was parol agreement by defendant to bid in property on foreclosure and convey to plaintiffs when as defense it would constitute fraud on plaintiffs — plaintiffs need not show ability to bid in property on sale. *Fletcher v. Manhattan Life Ins. Co.*, 484.

5. Appointment of temporary receiver denied where corporation is financially sound and there is no claim that individual defendants are not able to pay any judgment which may be rendered against them. *Smallwood v. Smith*, 533.

**PLEADINGS.**

6. Complaint does not set forth agreement which can be specifically enforced in suit against executor to compel conveyance of interest in real property and for accounting of rents and income received where facts do not disclose with sufficient clearness what the agreement, which was not in writing, actually was — creation of resulting trust not shown since there was no allegation of mutual mistake or of fraud or overreaching — when court of equity will not override Statute of Frauds. *Ankele v. Blankner*, 684.

**ESTOPPEL.**

*See* APPEAL, 3; BANKS AND BANKING; CONTRACTS, 5; SALES, 6.

**EVIDENCE.**

*See, also*, BILLS AND NOTES, 3; CONTRACTS, 10-12; CRIMES, 1-5; EXECUTORS AND ADMINISTRATORS, 1, 4; FALSE IMPRISONMENT, 1; INSURANCE, 5; LANDLORD AND TENANT, 1; LIBEL, 2, 3; MALICIOUS PROSECUTION; NEGLIGENCE, 2, 3; PLEADINGS, 1, 14, 15; SALES, 11; TAXATION, 3; WILLS, 4; WORKMEN'S COMPENSATION LAW, 1, 3, 9.

**RELEVANCY.**

1. Reception of evidence as to speculative and fanciful plan in condemnation proceedings to acquire property for park which was disregarded by court not considered prejudicial. *Matter of City of New York (Inwood Hill Park)*, 431.

**ADMISSIONS.**

2. Proof and effect — admission by party against interest may be proved without warning. *Mindlin v. Dorfman*, 770.

**EXAMINATION BEFORE TRIAL.**

*See* DEPOSITIONS, 1.

**EXCEPTIONS.**

*See* APPEAL, 2.

**EXECUTORS AND ADMINISTRATORS.**

*See, also*, ATTORNEY AND CLIENT, 5, 11; HUSBAND AND WIFE, 3; PARTITION, 1; TRUSTS, 7.

**APPOINTMENT.**

1. Decree of Surrogate's Court adjudging absentee died prior to issuance of letters is not *res adjudicata* as to date of death and binding on surrogate of another county — presumption of death — person is presumed to be dead seven years after being last heard from for purpose of establishing rights in estate — evidence — as proof was insufficient to raise presumption of death, direction that share of estate be deposited to credit of proceeding was proper. *Matter of Rowe*, 449.

**ALLOWANCES AND PAYMENTS OF CLAIMS.**

2. Supreme Court and Surrogates' Courts have concurrent jurisdiction of action on claim against decedent. *Michaels v. Flach*, 478.

**ACTIONS.**

3. Costs may be awarded by Appellate Division on reversal of judgment in favor of executors in cases where such court has power to

**EXECUTORS AND ADMINISTRATORS — Continued.**

reverse judgment, make new findings and direct entry of judgment in favor of other party — sections 1835 and 1836, Code of Civil Procedure, do not apply to or preclude award of costs against executors on appeal — action is unreasonably defended where defense is not on merits alone but solely on theory that plaintiff lost benefit of judgment recovered by default against all defendants on joint liability — waiver by executors of certificate of facts by not presenting defense on original settlement of order awarding costs. *Hewlett v. Van Voorhis*, 362.

4. Action by married woman to recover for services rendered to decedent — evidence not showing that decedent contracted for services — verdict for \$1,100 grossly excessive — plaintiff not carrying on separate business under Domestic Relations Law, § 51 — husband of claimant not competent witness — reasonableness of claim against decedent should be established by most satisfactory evidence and be clear and convincing. *Smith v. Burhyte*, 725.

**ACCOUNTING.**

5. Proceedings for accounting — order of reference for examination of intermediate account is inadvertently granted where no authority has been provided for such examination — objections to intermediate account premature — stay of proceedings under order of reference and prior orders in interest of estate to maintain *status quo*. *Matter of Appell*, 631.

**EXEMPTIONS.**

See TAXATION, 2, 7.

**FALSE IMPRISONMENT.****CIVIL LIABILITY.**

1. Acts constituting false imprisonment and liability therefor — owner of store is not responsible for act of his manager in arresting plaintiff after accusation of theft where evidence does not show that owner was informed of situation and that he took action in relation thereto — manager did not act within authority in arresting plaintiff — evidence that some one telephoned owner of store that there was woman in store who would not leave, does not show that owner was informed of situation. *Homeyer v. Yaverbaum*, 184.

2. Complaint held sufficient in action for false imprisonment which alleged that defendant police officer, without probable cause and without warrant, maliciously arrested plaintiff, took him before a police justice where he was found guilty, and on appeal to County Court judgment was reversed and plaintiff discharged — judgment of reversal did not destroy effect of allegation that arrest was made without probable cause, and maliciously. *Fowler v. Stuart*, 736.

**FALSE REPRESENTATIONS.**

See CORPORATIONS, 3.

**FEES.**

See COSTS AND FEES.

**FELLOW-SERVANTS.**

See SHIPS AND SHIPPING, 3.

**FORECLOSURE.**

See EQUITY, 4; MORTGAGES, 2-5.

**FOREIGN CORPORATIONS.**

See CORPORATIONS, 7-10.

**FOREST PRESERVE.**

See PUBLIC LANDS.

**FRAUD.**

See, also, EQUITY, 3; HUSBAND AND WIFE, 1; SHIPS AND SHIPPING, 2.

**ACTIONS.**

Plaintiff entitled to rescission of contract and recovery of consideration paid where complaint shows fraudulent representations by defendants to induce plaintiff to purchase corporate stock; his offer to return stock

**FRAUD — Continued.**

upon discovering fraud and demand for return of his money — measure of damages — fact that plaintiff alleged he was "damaged" did not require him to prove actual damages as consequence of alleged fraud and deceit — error for court to dismiss complaint for failure to prove difference between what stock was worth at time of its purchase and what it would have been worth if alleged representations had been true — plaintiff entitled to recover amount paid. *Haessig v. Gregory*, 111.

**FRAUDS, STATUTE OF.**

See EQUITY, 4, 6; VENDOR AND PURCHASER.

**FREE SPEECH.**

See MUNICIPAL CORPORATIONS, 6.

**GENERAL LAWS.**

[For table containing all chapters and sections cited and construed in this volume, see *ante*, p. lix.]

**GENERAL RULES OF PRACTICE.**

[For table of General Rules of Practice cited and construed in this volume, see *ante*, p. lix.]

**GRAND LARCENY.**

See CRIMES, 5, 6.

**GREATER NEW YORK CHARTER.**

[For table containing all sections cited and construed in this volume, see *ante*, p. lix.]

**GUARANTY.**

See CONTRACTS, 3.

**GUARDIAN AD LITEM.**

See PARTITION, 2.

**GUARDIAN AND WARD.**

See HABEAS CORPUS, 2.

**HABEAS CORPUS.****NATURE AND GROUNDS OF REMEDY.**

1. Writ of habeas corpus directing child be surrendered to father was improperly granted where relator failed to show incompetency of guardian and to establish that conditions have changed since writ denied in foreign State, making it now proper to change custody of child. *Matter of Standish*, 176.

**PROCEEDINGS.**

2. Final order of Virginia court in habeas corpus proceedings by father to regain possession of child from guardian is *res adjudicata* in habeas corpus proceedings instituted by father in this State, where Virginia proceedings were instituted in court of competent jurisdiction possessing jurisdiction of proceedings and parties — determination of court is final, though court reserved right to change custody of child under changed conditions — order is entitled to full faith and credit in New York State under section 1 of article 4 of Federal Constitution. *Matter of Standish*, 176.

**HIGHWAYS.****REGULATION AND USE FOR TRAVEL.**

1. Injuries from defects — State is liable for negligence in failing to maintain guard rail or other barrier on State road "at approach to bridge" where approach was part of highway maintained under patrol system. *Deyoe v. State of New York*, 716.

2. State highway maintained under patrol system — surface waters — action to recover damages caused by flooding plaintiff's land — negligence not shown in construction of culvert — question for jury as to whether flood of extraordinary character was such that it should have been anticipated. *Mead v. State of New York*, 739.

**HOTELS.**

See LANDLORD AND TENANT, 4.

**HUDSON RIVER.**

See EJECTMENT, 1.

**HUSBAND AND WIFE.**

See, also, CRIMES, 3.

**ANNULMENT OF MARRIAGE.**

1. A marriage will be annulled under Code of Civil Procedure, section 1750, on ground that consent was obtained by fraud, where husband refused to keep his promise to have religious ceremony performed after civil ceremony, where the marriage was never consummated. *Watkins v. Watkins*, 489.

**DIVORCE.**

2. Alimony — contempt proceedings to enforce payment of alimony — whether disobedience of order to pay alimony was willful and in contempt of court is addressed to discretion of court as is question whether defendant shall be fined or imprisoned — motion is properly denied where plaintiff had accepted reduced alimony — inability to pay alimony is not defense to contempt proceedings. *Thompson v. Thompson*, 228.

3. Death of husband in divorce proceedings pending motion to modify judgment to strike out alimony provision makes provision inoperative, but does not otherwise destroy force of judgment — substitution of executors of husband as defendants for purposes of motion — court has power to impose upon defeated party attorney and counsel fees and other expenses where order for reference, entered by consent, provided for payment thereof. *Hunter v. Hunter*, 678.

**SEPARATION.**

4. Temporary alimony and counsel fees — Nevada decree in divorce action dismissing complaint in action by defendant is not a bar to action for separation by wife or allowance of alimony and counsel fees. *Schermerhorn v. Schermerhorn*, 284.

5. An affidavit on motion to punish defendant for contempt for failure to pay allowance awards for support of children is insufficient where there is a failure to show that sequestration proceedings would be ineffectual — judgment compelling defendant to provide for maintenance of children is not warranted where complaint is dismissed upon merits. *Haas v. Haas*, 619.

6. Alimony — husband is not liable for alimony during violation of decree by wife in taking child out of Greater New York without consent of husband — absolute decree of divorce in favor of wife in foreign State justifies court in relieving husband from further payment of alimony — husband is liable for alimony between time of voluntary return of wife and modification of decree. *Harris v. Harris*, 646.

7. Default judgment — motion to vacate judgment and open default in separation action granting wife alimony where defendant desires to interpose as defense separation agreement relieving him from obligation to pay alimony or support his wife will be denied since agreement is invalid under section 51 of Domestic Relations Law. *Mabbett v. Mabbett*, 654.

**INCOME TAX.**

See TAXATION, 2.

**INDEPENDENT CONTRACTOR.**

See MASTER AND SERVANT, 2; MOTOR VEHICLES, 3.

**INDICTMENT AND INFORMATION.**

**AMENDMENT.**

Amendment to indictment substituting real name of defendant was proper in prosecution for violation of Liquor Tax Law. *People v. Cook*, 155.

**INFANTS.**

**ACTIONS.**

Defense that infant plaintiff falsely represented his age is available in action by infant to recover money deposited for stock margin —

**INFANTS — Continued.**

defense that complaint does not state facts sufficient to constitute a cause of action cannot be taken by answer. *Falk v. MacMasters*, 357.

**INFERIOR CRIMINAL COURTS ACT.**

[For table containing all sections cited and construed in this volume, see *ante*, p. lxi.]

**INJUNCTION.**

See, also, CORPORATIONS, 5; LANDLORD AND TENANT, 1.

**GROUND OFS OF RELIEF.**

1. To restrain defendants from manufacturing articles by same processes used by plaintiff there must be adduced conditions of strongest character, as it is in restraint of trade and competition and is an inhibition upon a man's right to pursue his occupation, except for and in plaintiff's interest. *Kaumagraph Co. v. Stampagraph Co., Inc.*, 66.

2. An injunction *pendente lite* should be granted in favor of domestic corporation where rival corporation puts to use its methods in furnishing photographic news service, *first*, by use of headings for ordinary news, and, *second*, in use of contract slips which in color, language, shape and arrangement were copies of those used by plaintiff. *Elliott Service Co. v. Dispatch P. N. S. Co., Inc.*, 615.

**SUBJECTS OF PROTECTION AND RELIEF.**

3. Property — employee will not be restrained from disclosing methods and processes which are exclusively within his employer's control and right to use where he does not obtain information concerning same during his employment. *Kaumagraph Co. v. Stampagraph Co., Inc.*, 66.

4. A secret process will be protected by restraining those who occupy a confidential relation from communicating such secrets to competitors in business or engage in same business and use knowledge thus acquired to detriment of employer. *Kaumagraph Co. v. Stampagraph Co., Inc.*, 66.

5. Corporate management — temporary injunction will be granted restraining payment of excess salaries to manager of corporation where net assets of corporation which might be reserved each year to pay plaintiff her proportion of net profits are insufficient. *Smallwood v. Smith*, 533.

**CONTRACT RIGHTS.**

6. Perpetual injunction will not be issued to restrain defendants from manufacturing articles by same process used by plaintiff where there was no evidence that plaintiff used any secret process or had exclusive right to use any process or machinery defendants were using. *Kaumagraph Co. v. Stampagraph Co., Inc.*, 66.

7. Enforcement of covenants ancillary to contracts of employment are not favored by law and will not be enforced unless some special circumstances render restriction a reasonable protection to employer's business. *Kaumagraph Co. v. Stampagraph Co., Inc.*, 66.

**ACTIONS FOR INJUNCTION.**

8. Remedy is by an action for injunction where in Supreme Court action for sum of money only plaintiff seeks to stay trial of an action brought by defendant in Municipal Court of City of New York on ground that Supreme Court action was begun prior to Municipal Court action and involves same subject-matter. *Indestructible Metal P. Co., Inc., v. Summergrade*, 199.

9. After dominant and servient tenements vest in one person subsequent grant does not revive right of way, and in suit to enjoin maintenance of fence in right of way plaintiff is not entitled to mandatory injunction where allegations of complaint are not so technically correct as to obviate necessity of proof to exclude exercise of court's discretion. *Robinson v. St. John's Guild*, 260.

**INSTRUCTIONS.**

See MOTOR VEHICLES, 1; PHYSICIANS AND SURGEONS; PRINCIPAL AND AGENT, 1; SHIPS AND SHIPPING, 4; TRIAL, 3-5; WILLS, 1.

**INSURANCE.**

*See, also, CORPORATIONS, 3.*

**ACCIDENT INSURANCE.**

Rupture suffered by mail clerk while performing customary work is not within meaning of policy against injuries through external, violent and accidental means. *Fane v. National Association of Railway Postal Clerks*, 145.

**FIRE INSURANCE.**

2. Action on policy — failure to perform condition that renewal policy in another company should be surrendered and canceled constitutes defense in action on fire insurance policy — counterclaim — equitable counterclaim held sufficient — limitation of action — time between commencement of action in Federal court and dismissal for want of jurisdiction is not counted — time action restrained by injunction is not counted. *Park & Pollard Co. v. Industrial Fire Ins. Co.*, 871.

**LIABILITY INSURANCE.**

3. Construction of contract — an insurer is liable on policy limiting liability but obligating it to pay all costs and expenses incident to settlement of claims in action by insured to recover cost of having attachment discharged — liberal construction of policy where insurer prepares instrument — cost of discharging attachment cannot be apportioned between parties where policy does not contemplate any apportionment of necessary costs and expenses. *Green River Distilling Co. v. Massachusetts Bonding & Ins. Co.*, 499.

**LIFE INSURANCE.**

4. Suit in equity to have plaintiff declared equitable owner of policy of life insurance and to recover proceeds thereof is not action *in rem* and jurisdiction cannot be acquired of non-resident by service by publication when she does not appear. *Schoenholz v. New York Life Ins. Co.*, 91.

5. Premiums — action to recover premiums paid on policies of life insurance — defense that policies were returned to be canceled — evidence of agreement by soliciting agent to cancel policies inadmissible over objection that no authority was shown in soliciting agent to make agreement — letter by defendant showing that he had policies in his possession after he claimed to have surrendered them admissible where it tended to show he did not surrender policies to soliciting agent as claimed. *McNamee v. Zimmelt*, 738.

**SUBROGATION.**

6. Action to recover from insured amount paid by insurance company for damage caused by sprinkler — subrogation of insurer to rights of insured against third person — general release by insured to third person — insurer cannot recover from insured in absence of showing that third person was liable for particular loss. *Franklin Fire Ins. Co. v. Weinberg*, 576.

**INTERPLEADER.**

**PROCEEDINGS.**

A notice of application for order of interpleader must be served in same manner as summons — jurisdiction of non-resident cannot be obtained by service of notice of application for order of interpleader outside State either personally or by substitution in personal action brought upon theory of money had and received. *Devoy v. Nelles*, 628.

**INTOXICATING LIQUORS.**

**CONSTITUTIONALITY OF STATUTE.**

1. States have same power they had before adoption of Eighteenth Amendment to Federal Constitution to prohibit traffic in intoxicating liquors, but power of States to legislate is limited to legislation not repugnant to laws enacted by Congress upon subject — in so far as State laws are "appropriate legislation" to enforce Eighteenth Amendment they are legal and enforceable; in so far as they are repugnant to Volstead Act they are abrogated by that act — Liquor Tax Law, as amended by chapter 911 of Laws of 1920, void in so far as permitting traffic in intoxicating liquors on payment of tax. *People v. Cook*, 155.

**INTOXICATING LIQUORS — Continued.****ACTIONS FOR PENALTIES.**

2. Fact that different penalties are provided in State statute and in Volstead Act does not make State statute void. *People v. Cook*, 155.

**CRIMINAL PROSECUTION.**

3. Defendant was properly convicted of violation of Liquor Tax Law where act as it stood before unconstitutional amendment is in force and operation. *People v. Cook*, 155.

**JUDGMENTS.**

*See, also*, HUSBAND AND WIFE, 5, 7; NEGLIGENCE, 2; PLEADINGS, 3, 16, 17.

**CONCLUSIVENESS OF ADJUDICATION.**

Persons concluded — an interlocutory judgment establishing right of account is binding on referee appointed to state account. *Moller v. Pickard*, 333.

**JURISDICTION.**

*See* COURTS; EQUITY, 2; INTERPLEADER; PROCESS, 1; SURROGATE'S COURT.

**JUSTICES OF THE PEACE.****TECHNICAL DEFENSES.**

Courts do not favor highly technical defenses in Justice's Court and such defenses will not generally prevail where merits favor opposite party. *Keefe v. Parker*, 919.

**LACHES.**

*See* BANKS AND BANKING; DEPOSITIONS, 2; EQUITY, 3; SALES, 9.

**LANDLORD AND TENANT.**

*See, also*, SUMMARY PROCEEDINGS.

**LEASES.**

1. Action for injunction to restrain tenants from permitting sub-lessees to continue in possession of premises where lease contains provision against subletting without consent of landlord — waiver is not defense where landlord unequivocally denies knowledge of previous subletting and where lease provided that waiver of breach shall not affect landlord's rights as to subsequent breach — fact that landlord would not suffer irreparable damages not defense — relief not dependent upon absence of adequate remedy at law where it is in nature of specific performance — landlord is entitled to mandatory injunction *pendente lite* ousting sublessees — evidence establishing irreparable damage entitling landlord to relief. *Boskowitz v. Cohn*, 776.

**TENANCIES FROM YEAR TO YEAR.**

2. Tenant dying one week after expiration of year — widow is not entitled to possession for remainder of year where notice to quit is served about six weeks after expiration of year for option is with landlord to regard holding over by his tenant as implied agreement on tenant's part to hold for another year or to treat tenant as trespasser. *Matter of Kinum*, 839.

**PREMISES AND ENJOYMENT AND USE THEREOF.**

3. Eviction — in summary proceedings for removal for non-payment of rent, lease examined and construed not to include lot in rear of dwelling — entry constituting actual partial eviction not shown — constructive eviction no defense. *Rural Publishing Co., Inc., v. Katzman*, 295.

**RENT.**

4. Actions — complaint is properly dismissed in action for rent of unfurnished apartment in apartment hotel where there is failure on plaintiff's part to file bill of particulars prescribed by chapter 944, Laws 1920, and defense is that rent was unjust and unreasonable — "hotel" as used in Laws of 1920, chapter 136, section 9, as added by chapter 944 of Laws of 1920, defined — apartment hotel not within meaning of statute. *Waitt Construction Co., Inc., v. Chase*, 327.

**LANDLORD AND TENANT** — *Continued.*

5. Action to recover rent of property in New York city — defense that lease was executed under duress not established — lease executed prior to taking effect of rent laws of 1920 not affected thereby. *Orinoco Realty Co., Inc., v. Bandler*, 693.

**LEGISLATURE.**

**LEGISLATIVE COMMITTEE.**

Joint legislative committee to investigate affairs of city of New York is not standing committee of Legislature within meaning of Legislative Law, § 61 — committee has no power to appoint subcommittee of one under resolution creating it — contempt — refusal of witness to be sworn before subcommittee of one is not contempt — committee has no power to take testimony in private. *Matter of Leach*, 702.

**LETTERS OF CREDIT.**

*See* CONTRACTS, 3.

**LIABILITY INSURANCE.**

*See* INSURANCE, 3.

**LIBEL.**

**PRIVILEGED COMMUNICATIONS.**

1. Allegation in answer in suit to compel specific performance of agreement to return corporate stock, charging plaintiff with conversion of funds of corporation and purchase of bonds therewith is privileged — rule relating to absolute privilege is sufficiently broad to extend to all matter otherwise libelous alleged or introduced in action which may be or become material. *Chapman v. Dick*, 551.

**ACTIONS.**

2. Pleadings — it is improper to reallege in separate cause of action for libel a cause previously alleged — such allegations will be stricken out as redundant — evidence — repetition of libel may be evidence of malice — proof of actual malice in each publication may be offered, but plaintiff cannot reallege and retry each separate cause of action. *Pignatelli v. Press Publishing Co.*, 275.

3. Action by manager and editor of newspaper for personal damages — allegation that plaintiff was injured as manager and editor need not be preceded by formal phrase "of and concerning" his business — said question cannot be raised first on appeal — refusal of court to charge jury upon "each independent statement in the pamphlet" not error where whole libel was part of complaint and detached statements set apart would destroy connection of whole — evidence establishing malice — verdict for \$3,000 not excessive — technical errors disregarded under Code of Civil Procedure, § 1317. *McKee v. Robert*, 842.

**LIENS.**

*See, also*, ATTORNEY AND CLIENT, 4.

**MECHANIC'S LIEN.**

Failure to file in time — expiration of time for filing lien deferred by acquiescence in owner's contention that contract was not completed — lien properly filed. *Colon & Co. v. Hassenpflug*, 522.

**LIFE TENANTS.**

*See* WILLS, 10.

**LIMITATION OF ACTIONS.**

*See* INSURANCE, 2; PUBLIC LANDS; WORKMEN'S COMPENSATION LAW, 1.

**LIQUOR TAX.**

*See* INTOXICATING LIQUORS.

**MALICIOUS ABUSE OF PROCESS.**

*See* PROCESS, 2.

**MALICIOUS PROSECUTION.**

**ACTIONS.**

Plaintiff, employee of garage company, arrested for procuring return of automobile to garage by false representations — evidence is admissible



**MALICIOUS PROSECUTION — Continued.**

as to good faith of defendant in obtaining possession of automobile from plaintiff's employer on presentation of check for repairs on which payment was subsequently stopped. *Gillie v. Fellows*, 734.

**MANDAMUS.**

*See, also*, MUNICIPAL CORPORATIONS, 1, 2, 6.

**NATURE AND GROUNDS IN GENERAL.**

1. Mandamus only issues where clear legal right appears — failure to present claim to comptroller of city of New York as required by Greater New York charter, section 261, is bar to issuance of writ against comptroller — relator did not establish clear legal right to writ since amount of claim remained unaudited. *People ex rel. Wells & Newton Co. v. Craig*, 407.

**SUBJECTS AND PURPOSES OF RELIEF.**

2. Acts and proceedings of municipalities — application by city of New York for peremptory writ of mandamus to compel extension of water system for fire protection — writ denied where city's liability for compensation is doubtful — alternative writ directed. *People ex rel. City of N. Y. v. Queens County Water Co.*, 356.

3. Acts of public officers — when writ will issue to require enforcement of Transportation Corporations Law, section 26. *People ex rel. Weatherwax v. Wall*, 929.

**ACTS OF PUBLIC OFFICERS.**

4. Writ of mandamus will not issue to compel comptroller of city of New York to pay vouchers under contract for constructing building for College of City of New York, where contract was not made in manner prescribed by statute — writ will not issue to compel payment under section 1132 of Greater New York charter where moneys if received would not be expended in defraying expense incident to gratuitous instruction by college — charter did not authorize trustees of college to bind city by contract involving liability. *People ex rel. Rangeley Construction Co., Inc., v. Craig*, 503.

**RELIEF.**

5. Mandamus will lie only where there is clear legal right to relief demanded. *People ex rel. Connors v. Board of Education of City of New York*, 5.

**MARITIME LAW.**

*See* SHIPS AND SHIPPING, 1, 3.

**MARRIAGE.**

*See* HUSBAND AND WIFE, 1.

**MASTER AND SERVANT.**

*See, also*, APPEAL, 4; FALSE IMPRISONMENT, 1; MOTOR VEHICLES; SHIPS AND SHIPPING, 1, 3; WORKMEN'S COMPENSATION LAW, 7, 8.

**SERVICE AND COMPENSATION.**

1. Remuneration — complaint in action to recover percentage of profits insufficient where it is not alleged what profits were earned by defendant. *Conti v. Cohen, Inc.*, 302.

**MASTER'S LIABILITY FOR INJURIES TO SERVANT.**

2. Negligence — owner of motor trucks hired by general contractor at given rate per truck per day was independent contractor and responsible for negligence of driver of truck rented from third person — general contractor is not responsible though trucks bore his name. *Wagner v. Motor Truck Renting Corporation*, 371.

**MEASURE OF DAMAGES.**

*See* TRIAL, 5.

**MECHANIC'S LIEN.**

*See* LIENS.

**MORTGAGES.**

*See, also, TAXATION, 2, 3.*

**CONSTRUCTION AND OPERATION.**

1. Sinking fund provision of railroad mortgage or deed of trust construed — "after" defined — "bonds outstanding" defined — practical construction of agreement by parties recognized by court. *New York Trust Co. v. Portland Railway Co.*, 422.

**FORECLOSURE BY ACTION.**

2. Parties — Federal receiver of property of defendant corporation is not entitled to be made party defendant in action to foreclose mortgage on real property of corporation — making receiver party was abuse of discretion of court where there does not appear to be any defense to the action. *Bate v. Brenack Stevedoring Co., Inc.*, 194.

3. Parties and process — a purchaser under foreclosure sale acquires good title to land though non-resident defendant is personally served without the State and certificate of Secretary of State as to notary's power to act was not attached to affidavit of service, where a new affidavit with certificate is filed *nunc pro tunc* after sale — judgment of foreclosure valid. *Kelly v. Schramm*, 377.

4. Pleading — separate defense that bond and mortgage had been assigned to secure corporate debt, but by renewal of notes without notice to assignor had been reassigned under Federal court order, whereupon defendant claimed contribution from plaintiff's assignor and from plaintiff, *held*, to be in effect and substance counterclaim justifying and requiring plaintiff's serving reply — matters set up by reply not superfluous, irrelevant or scandalous as to issue raised by counterclaim. *Hume v. Woodruff*, 510.

5. Judgment against mortgagee for burning building as counterclaim against assignee of mortgage — assignment executed after fire. *Markle v. Osborne*, 906.

**MOTIONS AND ORDERS.**

*See COSTS, 1; DEPOSITIONS, 2; PARTIES; PLEADINGS, 9, 16, 17; TRIAL, 1.*

**MOTOR VEHICLES.**

*See, also, MASTER AND SERVANT, 2.*

**INJURIES TO THIRD PERSON.**

1. Owner not liable in action for death of child where accident occurred while chauffeur was using automobile for his own purposes — it was error for court so to charge jury that it might find that at time of accident, chauffeur was engaged in business of owner where there was nothing in evidence that would warrant inference that use of machine would expedite master's business. *Donnelly v. Yuille*, 59.

2. Action to recover for injuries to boy suffered while jumping from motor truck, being driven by unlicensed chauffeur — boy, who was riding with permission of driver, not trespasser — unlicensed chauffeur presumed to be incompetent — negligence to employ such person where it must be presumed that if car had been properly operated for purposes for which it was designed accident would not have happened. *LaRose v. Shaughnessy Ice Co.*, 821.

3. Express company hiring motor truck by hour from owner who cared for it and selected and paid driver is not liable in action to recover for death caused by truck — driver was not special servant of express company — owner was independent contractor. *Charles v. Barrett*, 584.

**MUNICIPAL CORPORATIONS.**

*See, also, EMINENT DOMAIN; MANDAMUS, 2, 3.*

**OFFICERS.**

1. Process — mayor of city of New York is necessary party defendant in mandamus proceedings to compel payment of amount due under contract for constructing building for College of City of New York where charter of Greater New York requires warrants to be countersigned by mayor. *People ex rel. Rangeley Construction Co., Inc., v. Craig*, 503.

2. Alternative writ of mandamus to compel vacation of order of board

**MUNICIPAL CORPORATIONS** — *Continued.*

of health revoking relator's permit to sell milk will not be granted where relator's violations of Sanitary Code were numerous and action of board was not capricious — powers of board are administrative — writ will not issue where there is no abuse of discretionary power. *People ex rel. Agins & Klugerman, Inc., v. Board of Health, etc., of City of New York*, 562.

3. Certiorari to review proceedings of acting mayor of city of Buffalo in demoting police captain — courts will give more critical examination of evidence in such proceedings where official presiding at hearing may be witness to material facts on trial, and where he is without judicial experience or training, where determination is necessary whether or not he was influenced consciously or unconsciously, by his personal interest in controversy — charges that relator violated rules of police department not sustained — relator reinstated. *People ex rel. Winspear v. Kreinheder*, 887.

**CONTRACTS.**

4. Withdrawal of bid for construction of school building — contractor did not have right to withdraw his bid for construction of particular fireproof building and demand return of deposit where general appropriation made by board of estimate and apportionment was greater than bid, though estimated cost of particular building was less. *People ex rel. Conners v. Board of Education of City of New York*, 5.

5. Acceptance of bids — municipal corporation is entitled to reasonable time after receipt of bids for construction of particular school building in New York city to determine whether lowest bid was reasonable and contractor had no right to withdraw his bid while it was being considered, unless final action thereon was delayed for unreasonable length of time — when delay of thirty-nine days in accepting bid is not unreasonable. *People ex rel. Conners v. Board of Education of City of New York*, 5.

**USE AND REGULATION OF PUBLIC PLACES.**

6. Streets — ordinance against holding meetings in public streets without permit from mayor is valid — unjustifiable discrimination that others were permitted to hold like meeting not shown — withholding permit is not denial of free speech — mandamus is proper remedy where permit is improperly withheld. *People ex rel. Doyle v. Atwell*, 225.

7. Section 40 of new charter of city of Buffalo (Laws of 1914, chap. 217) vests all authority respecting licenses for signs in council which under old charter was vested in commissioner of public works. Ordinance with respect to signs was continued by new charter. *Kertz v. Adam & Co.*, 921.

**NEGLIGENCE.**

8. Defects in sewer — city of New York, having accepted and maintained sewer with knowledge of defects in construction is liable for damages caused by breaking of sewer adjoining plaintiff's store — city not liable for negligence of Public Service Commission or independent contractors under it — contractor is not liable where insufficiency of sewer was directly referable to faulty plans of engineers of Public Service Commission or for improper maintenance by city. *John Wanamaker, New York, v. City of New York*, 441.

**TAXATION.**

9. Special or local assessments — statute (Laws of 1888, chap. 131) by which city of Amsterdam acquired bridge required it to keep property in repair — cost of sidewalk built on said bridge property cannot be assessed against abutting owner — Laws of 1911, chap. 242, relating to said city, saving clause applied — rule of practical construction applied. *Carbonelli v. City of Amsterdam*, 848.

**ACTIONS.**

10. Employee working on per diem basis suspended pending determination of criminal charges is not entitled to pay during suspension — Greater New York charter, section 1569-a, not applicable to action by suspended employee to recover wages during period of suspension on criminal charges. *Manderille v. College of City of New York*, 107.

**MUNICIPAL CORPORATIONS — Continued.**

11. Statement in complaint as to agreement between city and contractor construed to be statement of fact and not conclusion of law and as such was admitted by demurrer. *Johnson Construction Co. v. City of Jamestown*, 917.

[For tables containing all sections of municipal charters, ordinances, etc., cited and construed in this volume, see *ante*, pp. lxi and lxi.]

**NEGLIGENCE.**

*See, also*, HIGHWAYS, 1, 2; MASTER AND SERVANT, 2; MOTOR VEHICLES, 1-3; MUNICIPAL CORPORATIONS, 8; NUISANCE; PHYSICIANS AND SURGEONS; RAILROADS, 1, 2; SHIPS AND SHIPPING, 1, 3, 4; STATE; WORKMEN'S COMPENSATION LAW, 4, 7, 8.

**ACTS CONSTITUTING NEGLIGENCE.**

1. Dangerous substances — defendant is liable in action for damages for loss of horses caused by chemical in street though street had not been accepted by public authorities and was not in general use, but had been dedicated to public use — when boundary is presumed to extend to center of street — purchase of land by plaintiff's employer and defendant from common source — reference in conveyance to map on which street is shown. *Shapiro v. Albany Chemical Co.*, 719.

2. Dangerous substances — action by servant of purchaser of can of chlorinated lime to recover from manufacturer for injuries suffered from explosion and action by husband for expense and loss of services — manufacturer liable — evidence that can came from defendant — letter written by defendant after accident that new device had been invented to prevent explosion admissible in evidence — judgment by Appellate Division on merits by virtue of Code of Civil Procedure, § 1317. *Hallenbeck v. Wander & Sons' Chemical Co., Inc.*, 855.

**RES IPSA LOQUITUR.**

3. Doctrine of *res ipsa loquitur* has no application where instrumentality through which accident happens is not wholly and entirely under defendant's control. *King v. Interborough Rapid Transit Co.*, 15.

**ACTIONS.**

4. Damages — money paid to servant to do work done during incapacitation from injuries is proper element of damages in action by husband to recover consequential damages for loss of services of his wife. *Orben v. State Investing Co.*, 658.

**NEGOTIABLE INSTRUMENTS.**

*See* BILLS AND NOTES.

**NEW TRIAL.**

*See* BILLS AND NOTES, 3; TRIAL, 2.

**NEW YORK CITY.**

*See* CONSTITUTIONAL LAW; CRIMES, 3; MANDAMUS, 1, 2, 4, 5; MUNICIPAL CORPORATIONS, 1, 5, 8, 10; TAXATION, 1.

[For tables containing all sections of various charters, codes and ordinances, etc., cited and construed in this volume, see *ante*, pp. lxi and lxi.]

**NONSUIT.**

*See* COURT OF CLAIMS.

**NUISANCE.**

*See, also*, VILLAGES.

**PRIVATE NUISANCES.**

Action for damages — defendant not liable in action for injuries suffered from faulty operation of freight elevator upon theory that it was of dangerous construction and unlawfully maintained when structure was lawfully constructed and not dangerous for purpose for which maintained — negligence not shown. *McDonnell v. Gerken*, 446.

**OPTIONS.**

*See* SALES, 5.

**ORDERS.**

See MOTIONS AND ORDERS.

**ORDINANCES.**

See MUNICIPAL CORPORATIONS, 6.

[For table containing all municipal ordinances, etc., cited and construed in this volume, see *ante*, p. lxxi.]

**PARENT AND CHILD.**

See, also, ADOPTION; CRIMES, 3.

**LIABILITIES OF FATHER.**

1. Estate of father is liable to third person for necessities furnished child prior to father's death — separation agreement is no defense for necessities furnished after death of mother. *Michaels v. Flach*, 478.

**HABEAS CORPUS.**

2. Courts are not limited to determining question of legal custody of child in habeas corpus proceedings by father to obtain possession of child from guardian. *Matter of Standish*, 176.

**PARTIES.**

See, also, MORTGAGES, 2, 3.

**CHANGE OF PARTIES.**

Action by trustee in bankruptcy — order staying proceedings until security for costs is given — motion to substitute bankrupt as plaintiff after composition and to vacate order requiring security should not have been entertained where it was in violation of stay — motion to dismiss complaint not before court where there is failure to give notice required by Code of Civil Procedure, § 768. *Helfand v. Massachusetts Bonding & Ins. Co.*, 759.

**PARTITION.****ACTION FOR PARTITION.**

1. Proceedings and relief — surrogate does not have power to direct payment of money to executor in proceedings to sell real property for payment of debts where interlocutory judgment in partition action directs sale and that money be paid into Surrogate's Court — surrogate has no power in partition actions to proceed under section 2707, Code Civil Procedure — order directing payment of money to executor affected substantial right of person entitled to share therein. *Matter of Murphy*, 139.

2. Proceedings and relief — defect in partition action for failure to obtain order designating person on whom service of summons should be made for infant defendant is cured when order is procured after sale with consent of purchaser — answer interposed by guardian *ad litem* — approval of sale by referee on rehearing, and confirmation of sale by court — new interlocutory judgment and sale is not required under circumstances of case — purchaser is not entitled to return of deposit since good and marketable title passed under sale after defect was cured. *Lennox v. Lennox*, 368.

3. Proceedings and relief — proof of succession is not shown where plaintiff fails to show ancestor died seized of land and where it appeared defendant received land under full covenant deed and for more than twenty years defendants and predecessors had occupied it in open, hostile and adverse possession — defendants acquired title by adverse possession. *Golden v. Fowler*, 254.

**PARTNERSHIP.****LIABILITIES OF PARTNERS.**

Simple contract executed by part of partners binds all though sealed — complaint in action for accounting on sealed contract against all partners is good without allegation that partner who did not sign contract ratified it — implied ratification by acceptance of benefits. *Maulner v. Eitingon*, No. 2, 756.

**PATENTS.****CONTRACTS.**

Licenses and contracts — a patentee is not entitled to recover for royalties where it appears that at time contract was executed he had

**PATENTS — Continued.**

no power to grant exclusive license for exhibition an use of staged device — defendant not liable where he made no use of device and in absence of consideration for agreement. *Pomeroy v. New York Hippodrome Corporation*, 114.

**PENAL LAW.**

See **CRIMES**.

[For table containing all sections cited and construed in this volume, see *ante*, p. lxix.]

**PENALTIES.**

See **INTOXICATING LIQUORS**, 2.

**PHYSICIANS AND SURGEONS.****LIABILITIES OF PHYSICIANS.**

Action to recover for injuries suffered from application of X-ray — improper to submit physician's want of due qualifications to jury as specification of negligence where his qualifications were undisputed — sores caused by use of X-ray treatment might have resulted from hypersensitiveness of patient or negligence — improper for court to charge that existence of sores was evidence of negligence. *Antowill v. Friedmann*, 230.

**PLEADINGS.**

See, also, **INJUNCTION**, 9; **LANDLORD AND TENANT**, 4; **LIBEL**, 2, 3; **MASTER AND SERVANT**, 1; **MORTGAGES**, 4; **PARTNERSHIP**; **RAILROADS**, 1.

**COMPLAINT.**

1. Amendment on trial — amendment of complaint on trial to conform to proof improper where amendment changes cause of action and where proof was received over defendant's objection — proof that defendant sold directly to third person inadmissible under complaint alleging sale of goods to plaintiff and resale to third person and transfer of contract of resale to defendant with agreement for commissions. *Finch v. Foster Co., Inc.*, 172.

2. Action on contract of employment — allegations in complaint, as to prior contract irrelevant to cause of action and properly stricken out — distinct alternative causes of action inconsistent with each other should be separately stated and numbered — complaint to contain plain and concise statement of facts. *Heaphy v. Eiditz*, 455.

3. Complaint does not state cause of action in action to recover excess of drawing account over and above commissions earned where there is failure to allege express or implied agreement to repay excess of advances over commissions. *Pease Piano Co. v. Taylor*, 468.

4. Complaint in action to recover for losses in winding up corporation which parties owed does not state cause of action where it alleges that affairs of corporation were wound up and plaintiff suffered loss, where agreement was not that defendant would pay one-half the losses, but would share equally losses arising out of liquidation. *Mautner v. Eitington*, No. 1, 754.

5. A complaint which sets forth several causes of action, not arising out of same transaction, some being legal, others equitable and calling for different kinds of relief, is improperly drawn and demurrer to it will be sustained. *Tyler v. Gordon*, 927.

6. Separate causes of action alleged in complaint should be separately stated and numbered. *Morris & Co. v. Southern Express Co.*, 930.

**ANSWER.**

7. Denials — separate defenses in each of which there is a reaffirmation of prior allegations of answer containing denials are improper. *Maas v. Malevinsky*, 99.

8. An answer which denies "each and every allegation set forth and contained" in numbered paragraphs of complaint "except as hereinafter specifically admitted" must be made definite and certain. *Maas v. Malevinsky*, 99.

**PLEADINGS — Continued.**

9. Defendant does not have absolute right to extension of time to serve answer — court will not grant extension when purpose is for delay — court may modify order and impose conditions — conditions may be imposed on opening default where interest of justice requires it. *Powell v. Schoellkopf*, 471.

10. Counterclaim for conversion of collateral interposed by defendant in action by accommodation maker to recover from comaker on theory of contract of indemnity deemed litigated where no objection is raised by plaintiff. *Logan v. Turner*, 493.

11. A motion by defendant trustee of a trust in suit for construction of will to strike out irrelevant allegations of intervenor demanding payment of its claim against plaintiff will be granted where matters in pleading are clearly not within controversy as determined by complaint. *Fleming v. Larkin*, 624.

12. Matter pleaded as separate defense must be treated on demurrer as entirely separate and distinct part of answer. *Ankele v. Blankner*, 684.

**DEMURRER.**

13. Demurrer to an answer brought on by a motion for judgment on pleadings is properly denied if any portion of the answer is sufficient — denial of knowledge or information as to plaintiff's infancy is sufficient against demurrer in action by infant to recover money deposited for stock margin — frivolous denial is not demurrable, remedy is motion to strike out — effect of confession and avoidance as to denial. *Falk v. MacMasters*, 357.

**AMENDED PLEADINGS.**

14. Amendment to complaint on trial in action to recover price of goods sold to conform to proof should have been permitted where evidence is admitted without objection establishing purchase of part of goods by plaintiffs as agent for defendant — recovery under complaint without amendment not authorized — judgment in favor of plaintiffs reversed though proper in part, so as to save to plaintiffs benefit of attachment. *Webb v. Friedberg*, 480.

**BILL OF PARTICULARS.**

15. It was error to refuse to permit defendant to testify to oral orders for goods in action on promissory notes, where he interposed counterclaim on breach of contract of sale of goods though bill of particulars furnished by defendant stating that orders were in writing — letters referring to oral orders admissible. *Franklin Knitting Mills v. Meyerson*, 163.

**MOTIONS.**

16. Denials and new matter in answer are not available on motion by defendant for judgment on pleadings in action for breach of contract engaging plaintiff as rector where reply admitting new matter is not interposed. *Baird v. Grace Church*, 272.

17. Motion for judgment on pleadings may be heard before referee who is appointed to hear and determine issues, but court is not deprived of jurisdiction and may entertain motion where plaintiff delays noticing cause for hearing — where contract is stated to be instrument upon which action is predicated and its legal effect has been alleged in complaint it can be considered on motion. *Pease Piano Co. v. Taylor*, 468.

[For tables containing all sections of the Code of Procedure and of the Code of Civil Procedure cited and construed in this volume, see *ante*, pp. lxxvii and lxxviii.]

**POWERS.**

See **TAXATION**, 6; **WILLS**, 5.

**PRACTICE.**

See **PLEADINGS**.

**PRESUMPTIONS.**

See EXECUTORS AND ADMINISTRATORS, 1; TAXATION, 5.

**PRINCIPAL AND AGENT.**

**MUTUAL RIGHTS, DUTIES, LIABILITIES.**

1. Compensation of agent — recovery cannot be had on theory that principal interfered with agent's claimed right of recovery against seller of house, in action to recover for services rendered principal in purchase of house — error for court to so charge jury. *Rourke v. Bickley*, 191.

2. Commissions — complaint does not state cause of action in action to recover excess of drawing account over and above commissions earned where there is failure to allege express or implied agreement to repay excess of advances over commissions. *Pease Piano Co. v. Taylor*, 468.

3. Compensation — commissions paid to firm and salary paid to president are not chargeable against gross profits under agreement by firm of stockbrokers to pay agent fifty per cent of net profits on sale of stock. *Wightman v. Hynson & Co., Inc.*, 526.

**PROBATE.**

See WILLS, 2-4.

**PROCESS.**

See, also, CORPORATIONS, 7, 9; COURTS, 1; INTERPLEADER; MORTGAGES, 3; MUNICIPAL CORPORATIONS, 1; PARTITION, 2.

**SERVICE.**

1. Publication — in action to enforce attorney's lien jurisdiction is acquired of non-resident client, against whom no personal claim is made, by service by publication. *Mc Kennell v. Payne*, 340.

**ABUSE OF PROCESS.**

2. Action for malicious abuse of process — issuance of final warrant in summary proceedings to dispossess does not constitute abuse where defendant instituted proceedings to dispossess, that plaintiff appeared, tendered and paid into court amount of rent prior to increase, that plaintiff defaulted at trial and in spite of abeyance of warrant for two weeks, refused to pay increased rent. *Kashdan v. Wilker Realty Co., Inc.*, 659.

**PUBLIC LANDS.**

**POSSESSORY RIGHTS.**

Lands of a sovereign State cannot be lost to State by failure to assert her title and Statute of Limitations does not apply where lands are held as sovereign — lands of Forest Preserve are held by State as sovereign — adverse possession of land owned by State not completed before creation of Forest Preserve, is not bar to action by State to recover lands within preserve — failure of Forest Commission to assert title to lands does not prejudice rights of State. *People v. Baldwin*, 285.

**PUBLIC SERVICE COMMISSION.**

See MUNICIPAL CORPORATIONS, 8.

**PRIVILEGED COMMUNICATION.**

See LIBEL, 1.

**RAILROADS.**

See, also, MORTGAGES, 1.

**OPERATION.**

1. Action for injuries suffered at crossing — complaint is insufficient that does not allege result of negligence or nature of injury. *Levey v. Payne*, 581.

2. Statutory regulation — construction of bridge over tracks as substitute for previous highway — railroad company is not liable for injuries resulting from automobile crashing through defective barrier on bridge in absence of notice required by Railroad Law, § 93 — barriers constitute part of roadway as distinguished from framework and abutments of bridge. *Burchard v. Payne*, 829.



**REAL PROPERTY.**

See LANDLORD AND TENANT; PARTITION; VENDOR AND PURCHASER.

**RECEIVERS.**

See CORPORATIONS, 4; MORTGAGES, 2.

**REDUNDANCY.**

See LIBEL, 2.

**REFERENCES.**

See, also, EXECUTORS AND ADMINISTRATORS, 5; JUDGMENTS; PLEADINGS, 17.

**REFEREES AND PROCEEDINGS.**

Agreement that referees may fix their own fees is unenforceable under Code Civil Procedure, § 3296 — stipulation that referees might elect to take twenty-five dollars per hour complies with Code — referees are not authorized to fix fees at lump sum — when facts on motion for retaxation are too indefinite to enable Appellate Division to tax costs — expense of printing opinion cannot be taxed in absence of stipulation. *City of New York v. Empire City Subway Co., Ltd.*, 643.

**REGULATIONS.**

[For tables containing all United States and municipal regulations cited and construed in this volume, see *ante*, p. lxx.]

**RELEASE.**

See INSURANCE, 6.

**RELEVANCY.**

See EVIDENCE, 1.

**RELIGIOUS CORPORATIONS.****PROTESTANT EPISCOPAL CHURCH.**

Complaint in action for breach of contract engaging plaintiff as rector states facts sufficient to constitute cause of action though it contains many averments which are not facts. *Baird v. Grace Church*, 272.

**REPLEVIN.****RIGHT OF ACTION AND DEFENSES.**

Joint action to recover possession of goods — counterclaim against one of plaintiffs to recover possession of other goods not maintainable — breach of contract on part of one of plaintiffs cannot be asserted as counterclaim. *Jacobs v. Mulford*, 835.

**REPLY.**

See MORTGAGES, 4; PLEADINGS, 16.

**RES IPSA LOQUITUR.**

See NEGLIGENCE, 3.

**RES JUDICATA.**

See HABEAS CORPUS, 2; SALES, 5; TAXATION, 5.

**RESULTING TRUST.**

See EQUITY, 6.

**REVISED STATUTES.**

See STATUTES.

**RIGHT OF WAY.**

See DEEDS, 2.

**ROADS.**

See HIGHWAYS.

**RULES.**

[For table of the General Rules of Practice and of the Rules of Civil Practice cited and construed in this volume, see *ante*, p. lxxix.]

## SALES.

See, also, PLEADINGS, 1, 15.

## CONSTRUCTION OF CONTRACT.

1. Contract for sale f. o. b. point of shipment to be paid for by sight draft after inspection is contract for goods to be delivered at point of destination — delivery of possession not made where goods were delivered to carrier. *Standard Casing Co., Inc., v. California Casing Co., Inc.*, 187.

2. Contract providing for "Delivery at New York: When called for" construed as not to require buyer to call for goods at seller's place of business. *Liondale Mercantile Co., Inc., v. Gerber*, 345.

3. Expression "net landed weight" in a c. i. f. contract for sale of goods to be shipped from Japan to San Francisco modifies contract so as to make it one for delivery by seller at San Francisco of full weight stipulated. *Willits & Patterson v. Abekobei & Co., Ltd.*, 528.

4. Action to recover for delay in delivery of goods sold — goods sold in New York city on c. i. f. contract to be shipped from Japan — goods consigned to seller and insured in his name — place of delivery was city of New York — whether buyer called for delivery at seller's place of business is question for jury — damages — market value in New York city at time of breach admissible on question of damages — it was proper to consider fact that in usual course of transportation it requires about two months for goods to reach New York city from Japan, unless express shipment from Pacific coast is made and that buyer had paid \$350 for such express shipment, in determining whether there had been unreasonable delay — buyer is entitled to recover where he was ready to accept delivery and goods were not delivered within reasonable time. *Schopflocher v. Essgee Co. of China, Inc.*, 781.

5. Option to make additional purchases indefinite and unenforceable where there is uncertainty as to quantity of goods plaintiff is entitled to buy and as to limit of time during which privilege is to be exercised and no price is stated — *res judicata* — judgment against plaintiff on counterclaim in former action by defendant is *res judicata*. *Cohen & Sons., Inc., v. Lurie Woolen Co., Inc.*, 797.

## PERFORMANCE OF CONTRACT.

6. Title and possession of seller — title to goods in deliverable state passes to buyer when contract is made where there is an unconditional contract to sell specific goods — conduct of owner estopping him from denying authority of one in possession of goods to make sale. *Hier v. Wightman*, 214.

7. Offering goods for resale amounts to acceptance — receipt and retention of bill of lading for goods shipped f. o. b. point of shipment constitutes acceptance — when defendant's authorization of delivery does not warrant conclusion that shipments were to be made in order of time in which contracts of sales were made. *Eagle Mfg. Co. v. Arkell & Douglas, Inc.*, 788.

## OPERATION AND EFFECT.

8. Transfer of title as between parties — title to engine passes on delivery by seller to railroad for shipment under contract of sale or return — buyer is liable for purchase price where he failed to return engine within time limit, though engine was destroyed by explosion before test or trial. *Cronk & Carrier Mfg. Co. v. Galbraith Milling Co.*, 568.

## REMEDIES OF SELLER.

9. Rejection of goods by defendant on ground that they were not of quality purchased, made five months after deliveries began, during which period he made no written complaint as to quality of goods and after price of goods had begun to decline, was too late to relieve him of his liability to pay purchase price. *Palisade Curtain Co., Inc., v. Korn*, 88.

10. Action to recover purchase price of goods delivered — defense that goods were rejected as not in accordance with sample — question for jury whether goods were accepted or rejected within reasonable time. *Rotary Shirt Co., Inc., v. Meltzer*, 102.

**SALES — Continued.**

11. Action for purchase price — evidence in action to recover on acceptance of time draft given for purchase of goods to be delivered, examined, and held, to be question for jury as to breach of contract and waiver — seller could not dispose of part of goods before draft due and recover as for full performance. *Liondale Mercantile Co., Inc., v. Gerber*, 345.

12. Action to recover purchase price of goods shipped to plaintiffs on bill of lading to order of owner — title did not pass where plaintiffs without consent of owner, obtained possession of bill of lading without paying draft — giving defendant delivery order on forwarding agent did not constitute delivery where order did not specify particular goods — delivery to carrier not delivery to buyer where bill of lading issued to seller — title did not pass where bill of lading issued to seller's order and transferred to bank on payment of draft — remedy of seller, if any, is action for non-acceptance of goods. *Pottash v. Cleveland-Akron Bag Co.*, 763.

**REMEDIES OF BUYER.**

13. Measure of damages for failure to deliver goods to be shipped by seller in San Francisco f. o. b. to buyer in New York city is difference between market price in New York city at time when delivery should have been made and contract price plus freight charge from San Francisco to New York. *Standard Casing Co., Inc., v. California Casing Co., Inc.*, 187.

14. Action for refusal to deliver — contention of seller that buyer did not demand delivery within time specified not sustained in view of modification of contract extending time of delivery — direction for delivery in "carload lots f. o. b. New York" is ambiguous in view of location of both parties in Greater New York — liability of buyer to pay cost of transportation — waiver by seller of objection that shipping instructions were not sufficiently specific in view of ambiguous provision as to delivery — delay in sending shipping instructions not sufficient to authorize seller to renounce obligations under contract — failure of seller to rescind contract not shown. *Partola Mfg. Co. v. General Chemical Co.*, 697.

**CONDITIONAL SALES.**

15. Agreement to deliver motor truck together with special body — conditional sale covering said agreement without mention of special body — assignment of said contract together with notes given in payment — action by purchaser against assignee to recover amount paid after rescission of contract for failure to deliver special body — plaintiff merely general creditor without specific claim upon truck where he makes no demand for return of money paid or of unpaid notes — possession of truck by assignee as security for other claims against seller — Personal Property Law, § 65, gives right of action solely against seller where property has been sold in violation of its provisions. *Stella v. Bankers Commercial Corporation*, 515.

**SEAL.**

See PARTNERSHIP.

**SELF-SERVING DECLARATIONS.**

See CONTRACTS, 10.

**SEPARATION.**

See HUSBAND AND WIFE, 4-7; PARENT AND CHILD.

**SEQUESTRATION.**

See HUSBAND AND WIFE, 5.

**SERVICE.**

See PROCESS, 1.

**SESSION LAWS.**

[For table containing all Session Laws cited and construed in this volume, see *ante*, p. lxiii.]

**SEWERS.**

See MUNICIPAL CORPORATIONS, 8.

**SHIPS AND SHIPPING.**

**LIABILITIES OF OWNERS.**

1. Injuries to longshoreman — longshoreman injured while using defective truck in loading boat — issues of negligence, contributory negligence and assumption of risk for jury where shipper's representative was notified of defect and directed plaintiff to continue — longshoreman is not in same class as seaman — seaman is bound to use ship's appliances — fact that longshoreman has security of maritime law does not change his rights and duties. *Malukas v. Overseas Shipping Co., Inc.*, 224.

2. Defendant is chargeable for acts of operators and with notice that money received was freight money in action to recover prepaid freight where legal title to vessel is in defendant as security for loan under agreement that all freight should be paid defendant by operators and actual owners — prepaid freight recoverable where goods are not delivered — fraud in obtaining prepayment is not essential to cause of action. *McInnes & Co., Inc., v. Equitable Trust Co. of New York*, 649.

3. Negligence — action to recover for injury to longshoreman as result of fall through hatchway aboard ship while employed as stevedore — master liable for failure to take reasonable precautions in safeguarding person of stevedore — foreman not fellow-servant where duty devolved upon master, though he delegated it to another — contributory negligence question for jury — no assumption of risk by plaintiff — Workmen's Compensation Law inapplicable, remedy being at common law — maritime law as to contributory negligence, fellow-servant doctrine and measure of damages applicable. *Kennedy v. Cunard Steamship Co., Ltd.*, 459.

4. Action at common law to recover for injuries suffered by longshoreman in falling through hatchway — accident caused by board covering hatchway tilting so that plaintiff fell through — defendant not bound to inspect ledge upon which board rested — charge should have limited issue to question whether foreman should have noticed shortness of board and then inspected ledge beneath. *McCabe v. Turner & Blanchard, Inc.*, 859.

**SPECIAL OR LOCAL ASSESSMENTS.**

See MUNICIPAL CORPORATIONS, 9.

**SPECIFIC PERFORMANCE.**

See LANDLORD AND TENANT, 1.

**STARE DECISIS.**

See EJECTMENT, 1.

**STATE.**

See, also, PUBLIC LANDS.

**CLAIM AGAINST STATE.**

Enabling act (Laws of 1918, chap. 611) does not render State liable for death of member of National Guard from injury arising from negligence of decedent while performing act in violation of duty — Legislature cannot direct payment of claim where there is no legal or moral obligation against State, conceding validity of act — evidence is insufficient to bring case within it where death resulted in manner different from that stated in act. *Lewis v. State of New York*, 712.

**STATE TAX COMMISSION.**

See TAXATION, 3.

**STATUTE OF FRAUDS.**

See EQUITY, 4, 6; VENDOR AND PURCHASER.

**STATUTE OF LIMITATIONS.**

See LIMITATION OF ACTIONS.

**STATUTES.****ENACTMENT.**

Fifteen days within which mayor of city of New York must return bill to legislative house from which it was sent as required by section 2 of article 12 of Constitution begins to run upon date of mailing of bill in Albany and not upon date when it is received in New York city — section 34 of General City Law respecting "transmission" of bill to mayor of city is controlling. *People ex rel. Boyle v. Cruise*, 705.

[For tables of the Session Laws and Statutes cited and construed in this volume, see *ante*, p. lxiii *et seq.*]

**STAY OF PROCEEDINGS.**

See EXECUTORS AND ADMINISTRATORS, 5; INJUNCTION, 8; INSURANCE, 2; PARTIES; TRIAL, 1.

**STOCKHOLDERS.**

See CORPORATIONS, 3, 4.

**STOCK TRANSFER TAX.**

See TAXATION, 5.

**STREET RAILWAYS.****INJURIES TO PASSENGERS.**

1. In absence of negligence chargeable to it, defendant railway was not liable for act of passenger on its train in throwing bundle of newspapers therefrom which struck passenger standing on elevated railway platform. *King v. Interborough Rapid Transit Co.*, 15.

**EXERCISE OF CARE.**

2. When absence of guard on platform of car from which bundles of papers were thrown by passenger cannot be said to have been cause of injury to passenger who was hit by bundle while standing on station platform — in absence of proof that defendant's train approached elevated railroad platform at high and reckless rate of speed or that it passed platform it cannot be said negligence on defendant's part was shown. *King v. Interborough Rapid Transit Co.*, 15.

**STREETS.**

See MUNICIPAL CORPORATIONS, 6; NEGLIGENCE, 1.

**SUBROGATION.**

See INSURANCE, 6.

**SUCCESSOR TRUSTEE.**

See TRUSTS, 4.

**SUMMARY PROCEEDINGS.**

See, also, LANDLORD AND TENANT, 2, 3; PROCESS, 2.

**DEFENSES.**

Construction — tenant of apartment not residing therein, but subletting rooms does not occupy premises for dwelling purposes only, within meaning of Laws of 1920, chapter 942, adding to Code of Civil Procedure, section 2231, subdivision 1-a — such tenant may be dispossessed. *Jackson v. Grey*, 656.

**SUPREME COURT.**

See SURROGATE'S COURT.

**SURROGATE'S COURT.**

See, also, EXECUTORS AND ADMINISTRATORS, 1, 2; PARTITION, 1.

**ALLOWANCE AND PAYMENT OF CLAIMS.**

Supreme Court and Surrogate's Court have concurrent jurisdiction of action on claim against decedent. *Michaels v. Flach*, 478.

**TAXATION.**

See, also, MUNICIPAL CORPORATIONS, 9.

**LEVY AND ASSESSMENT.**

1. Review — assessments on parcels of real estate in New York city held invalid on certiorari to review assessments when basis of valuation

**TAXATION — Continued.**

of tracts is laid in speculative estimates founded on fanciful development in undeveloped section — valuation placed on property by disinterested witnesses adopted. *People ex rel. Empire Mortgage Co. v. Cantor*, 437.

**INCOME TAX.**

2. Interest on real property mortgage on which recording tax paid is part of mortgagee's taxable income — Tax Law, section 251, exempting mortgages on which recording tax has been paid from State and local taxation does not exempt interest from income tax — income tax is tax on individual and his income is used only in fixing measure of tax. *People ex rel. Central Union Trust Co. v. Wendell*, 131.

**MORTGAGE TAX.**

3. Determination by State Tax Commission of value of long term leases — Commission is not bound by value placed thereon by mortgagor — opinion evidence, cost of property and improvements thereon may be considered in determining actual or market value of leases — books of mortgagor amount to admission of value of lease. *People ex rel. Gorham Mfg. Co. v. State Tax Commission*, 852.

**STOCK TRANSFER TAX.**

4. Voting trust agreement entered into in 1909 — transfer of stock thereunder after amendment of Tax Law, § 270, in 1911 is taxable — constitutional law — taxation under said amendment does not involve obligation of contract within meaning of constitutional inhibition. *Chicago Great Western R. R. Co. v. State of New York*, 742.

**TRANSFER TAX.**

5. Order fixing transfer tax is not *res judicata* preventing appointment of appraiser upon discovery of additional assets — no presumption exists in absence of specific finding in appraiser's report that value of assets was ascertainable or that his failure to report was equivalent to finding of exemption. *Matter of Carey*, 566.

6. State has right to levy tax upon exercise of power of appointment — transfer under powers of appointment by resident of New York State is not taxable where donors were residents of adjoining state where property was situated and will was probated. *Matter of Canda*, 597.

7. Unverified petition on application for exemption from transfer tax has no probative value and order granting exemption will be reversed and proceeding remitted to surrogate. *Matter of Scully*, 639.

**TESTAMENTARY CAPACITY.**

See WILLS, 1.

**TESTAMENTARY TRUSTS.**

See TRUSTS, 5.

**TRADE ACCEPTANCE.**

See CONTRACTS, 11.

**TRANSFER TAX.**

See TAXATION, 5-7.

**TRESPASS.****ACTIONS.**

Evidence — action to recover damages for breaking into and setting fire to building — evidence tending to show insanity of *tori feisor* — admissibility. *Humiston v. Wood*, 901.

**TRIAL.**

See, also, BILLS AND NOTES, 3; CONTRACTS, 12; MOTOR VEHICLES, 1; PLEADINGS, 9, 11.

**MOTIONS AND ORDERS.**

1. Motion in Supreme Court action for sum of money only to stay trial of action in Municipal Court of City of New York between same parties and involving same subject-matter — order which does not provide for undertaking under Code of Civil Procedure, § 611, is

**TRIAL — Continued.**

improper — order cannot be made in one action staying trial of another — remedy is action for injunction. *Indestructible Metal P. Co., Inc., v. Summergrade*, 199.

**CONDUCT OF COUNSEL.**

2. A new trial is warranted where argument and conduct of counsel in action on contract between plaintiff and defendant concerning probate of their brother's will deprived plaintiff of fair and impartial trial. *Shea v. Shea*, 126.

**INSTRUCTIONS.**

3. It was error for trial court to refuse to submit to jury question as to effect of agreement between parties where testimony of parties to oral agreement for lease of wagons was conflicting as to sum which should be paid. *Foote v. Greenfield*, 124.

4. Applicability to evidence — in action to recover possession of automobile assigned to lumber company but used by assignor who thereafter traded it to defendants, but lumber company sold it to plaintiff before it was delivered to defendants, court erred in charging jury that if automobile was not delivered to defendants until it had been sold plaintiffs, defendants could succeed, and that if delivery to plaintiffs was first, then defendants had no title — evidence sufficient to carry case to jury as to passing of title. *Hier v. Wightman*, 214.

5. Charge is erroneous which submits two measures of damages in action to recover on breach of contract to sell dental business. *Brown v. Salzberg*, 235.

**VERDICT.**

6. Verdict will be set aside at Trial Term or on appeal where undisputed evidence and probabilities clearly indicate that it was contrary to weight of evidence. *Palisade Curtain Co., Inc., v. Korn*, 88.

**TRUSTS.****CONSTRUCTION.**

1. Assignee for benefit of creditors of grantor is not entitled to claim any portion of capital fund after more than twenty-five years elapsed since creation of trust in an action to construe a trust deed — wife is entitled to one-third of principal on death of grantor under trust in personal property for benefit of intended wife for life with reversion to grantor on her death or his representatives or legatees on his predeceasing beneficiary — wife's one-third passes to her executrices. *Street v. Post*, 304.

2. Under trust to pay interest "as and when received" to beneficiary and on his death to third person the interest accrued but not matured on death of first beneficiary goes to his estate — construction that accrued interest is payable to second beneficiary would make instrument void under provisions of Personal Property Law, § 16, against accumulations — construction rendering instrument valid rather than void preferred. *Equitable Trust Co. v. Miller*, 391.

3. Interest of *cestui que trust* — Real Property Law, §§ 105 and 107 construed and applied in relation to sale of real property by trustee — agreement by trustee for sale of property should not be confirmed where at time of application to court property has materially increased in value — court concerned with interests of *cestui que trust* only. *Matter of Central Union Trust Co.*, 667.

**SUCCESSOR TRUSTEE.**

4. It is error for court to appoint individual as successor trustee contrary to wishes and express desires of all parties interested and entitled to ultimate ownership of principal of trust fund — while court was not bound to appoint particular corporation selected by parties as trustees a corporate agent should have been appointed. *Matter of Gunther*, 28.

**TESTAMENTARY TRUST.**

5. Upon death of sole surviving trustee of testamentary trust, the trust, by virtue of section 20 of Personal Property Law, vests in Supreme Court and shall be executed by some person appointed by court and invested by it with any and all powers and duties of original trustee,

**TRUSTS — Continued.**

but trust estate will remain vested in court and cannot be vested in trustee. *Matter of Gunther*, 28.

**MANAGEMENT OF TRUST PROPERTY.**

6. Proceeding to compel substituted trustee to account — trustee charged with loss from investment of trust funds where there was failure to exercise proper care, although there was nothing to impugn his good faith. *Durant v. Crowley*, 540.

**EXECUTION OF TRUST BY TRUSTEE.**

7. Purchase of trust property by corporation organized by trustees for that purpose — payment of purchase price from proceeds of business — stock issued to trustees and beneficiaries individually must be returned to estate where shares represent profits made by trustees in their dealings with trust property — consent of beneficiaries did not validate transaction since there was a contingent remainder over to their heirs — participation in transaction by executor not ground for removal — issue of shares to third person for services as manager not illegal. *Skinnell v. Mahoney*, 808.

**UNDERTAKING.**

See ATTACHMENT, 1; TRIAL, 1.

**UNITED STATES.**

[For tables containing all sections of the United States Constitution, Statutes, Judicial Code, Proclamations and Regulations cited and construed in this volume, see *ante*, pp. lviii, lix and lxx.]

**VENDOR AND PURCHASER.**

See, also, PARTITION, 2; PRINCIPAL AND AGENT, 1.

**CONSTRUCTION AND OPERATION OF CONTRACT.**

Memorandum signed by parties construed as agreement by vendor to sell — doctrine that provision in writing overrides that in printing applied — memorandum agreement may be enforceable though parties contemplate formal contract — memorandum not complete contract, which may be specifically enforced, where duration of mortgage and rate of interest not specified. *Spielvogel v. Veit*, 804.

**VERDICT.**

See EJECTMENT, 2; EXECUTORS AND ADMINISTRATORS, 4; TRIAL, 6; WILLS, 2.

**VILLAGES.**

**NUISANCE.**

Village is liable for nuisance caused by sea water passing through cut made by it in natural barrier and injuring trees, plants, shrubs and other vegetation on plaintiff's land — measure of damages is cost of replacing trees, etc. — permission to appeal to Court of Appeals granted because of doubt as to proper measure of damages. *Davies v. Jagger*, 196.

**VOLSTEAD ACT.**

See INTOXICATING LIQUORS, 1.

**WAIVER.**

See EXECUTORS AND ADMINISTRATORS, 3; LANDLORD AND TENANT, 1; SALES, 14.

**WATERS.**

See DEEDS, 1.

**WILLS.**

**TESTAMENTARY CAPACITY.**

1. Testamentary capacity not shown in proceedings to probate will — will executed through undue influence — instructions — general instructions not applied to facts of case insufficient — charge, though not excepted to, constituted error in fact where it was so inept as to constitute substantial error in fact so as of itself to require new trial. *Matter of Taylor*, 865.



**WILLS — Continued.****PROBATE.**

2. Review — verdict of jury in probate of will where question of testamentary capacity is involved must be considered and its effect determined under same rules that govern court in review of verdict of jury in other cases where by Constitution, or by statute, parties have right to jury trial. *Matter of Spang*, 310.

3. In determining whether the verdict of jury in proceedings to probate will is against weight of evidence question is whether finding of jury was so far against weight of evidence as to indicate passion or prejudice as procuring cause of verdict. *Matter of Spang*, 310.

4. Evidence — mere scintilla of evidence is not sufficient to overcome presumption of sanity of testator — verdict that deceased was not of sound mind was not against weight of evidence. *Matter of Spang*, 310.

**CONSTRUCTION.**

5. Power of appointment — provisions in will for trust for life of child is necessarily confined in its operation to testator's own property and power of appointment operates only on remainder in trust property after child's death — Real Property Law, § 176, is applicable only where the will permits of no other interpretation than that it can be said that intent that will is not to operate as an execution of power appears by necessary implication — intent not to exercise power must appear in will itself — resort cannot be had to extraneous instruments to determine question — power not exercised as to property situated in New Jersey. *Speir v. Benvenuti*, 209.

6. Designation of devisees — will is not revoked by subsequent marriage of testator who made will in 1914 with devise to woman he subsequently married and to another, but with no provision as to issue — Decedent Estate Law, § 35, as amended by Laws of 1919, chapter 293, applicable where will may be read as having provided for widow by antenuptial bequest. *Matter of Gaffken*, 257.

7. Testamentary trusts — provisions of will that on death of beneficiary income shall be paid to lineal descendants in equal shares — grandchildren of deceased son of beneficiary take *per stirpes* and not *per capita* where a daughter of beneficiary is living — later portion of clause of will taken into consideration in determining testator's intention. *Whitehead v. Ginsburg*, 266.

8. Designation of devisees — bequest to individual by name and not simply as wife or widow where testatrix devised estate in trust, income to be applied to son and "his present wife," naming her — words "present wife" significant and emphasize point that she was particular person — bequest was to individual named and not to her simply as wife. *Man v. Man*, 547.

9. Bequest in will to daughter for life and then to "child or children" — remainders vested on death of life tenant — sole surviving child of life tenant takes estate on death of life tenant — grandchildren of life tenant do not share. *Hunt v. Wickham*, 800.

10. Devise of estate for life and after death of life tenant to her heirs — remainder contingent till termination of life estate — subsequent vesting of estate of children of life tenant in her did not vest remainder in tenant — life tenant cannot pass good title — word "heirs" as used by testator was considered by him in its primary sense to designate those who succeed to real property by reason of relationship to deceased and not living person. *Mersereau v. Katz*, 895.

11. Will construed to speak as of date of death of testator's sister rather than his widow as to corpus of estate — remainder to heirs at law and next of kin ascertainable at future date. *Matter of Bump*, 917.

**WITNESSES.**

See **BILLS AND NOTES**, 3; **DEPOSITIONS**, 2; **EXECUTORS AND ADMINISTRATORS**, 4; **LEGISLATURE**.

**WORKMEN'S COMPENSATION LAW.****ELECTION OF REMEDY BY EMPLOYEE.**

1. Election to sue third person and subsequent discontinuance of action does not estop claimant from proceeding under statute — limita-

**WORKMEN'S COMPENSATION LAW — Continued.**

tion of action under Code Civil Procedure, § 1902, not applicable under Workmen's Compensation Law — evidence showing dependency — rule in compensation cases does not require highest degree of evidence; it is satisfied if there is some evidence of probative character to support findings. *Bennett v. Page Brothers*, 745.

**EXEMPTED PURSUITS.**

2. Charitable corporation maintaining cemetery is engaged in business for pecuniary gain where it sells burial privileges and devotes money so raised to expenses of running cemetery and for religious and educational purposes, within meaning of subdivision 5 of section 3 of Workmen's Compensation Law. *Dillon v. Trustees of St. Patrick's Cathedral*, 201.

**ARISING OUT OF AND IN COURSE OF EMPLOYMENT.**

3. Employee of department store injured while pulling out drawer — evidence not justifying award — cancer not due to injury suffered by her in course of her employment. *Schapiro v. Wanamaker*, 810.

4. Plaintiff's remedy is under Workmen's Compensation Law and not by action for negligence where she was injured by negligence of elevator operator, also in defendant's employ, while on her way to street for personal purpose during her luncheon hour. *Martin v. Metropolitan Life Insurance Co.*, 382.

5. Injury to eye — when failure to give notice of injury as required by section 18 prejudicial to employer and insurance carrier where claimant did not call physician until nearly a year after accident — evidence insufficient to establish that permanent loss of eyesight resulted from injury. *Conley v. Upson Co.*, 815.

6. Paralysis of left side — working in intense heat. *Murray v. Cummings Construction Co.*, 903.

**HAZARDOUS EMPLOYMENT.**

7. Gravedigger is engaged in hazardous employment within meaning of section 2, group 13, of Workmen's Compensation Law while making excavation for monument foundation — contributory negligence and assumption of risk is no defense by corporation to an action to recover for injuries suffered by caving in of sides of excavation where corporation had not obtained compensation for its employees as provided in section 50 of Workmen's Compensation Law. *Dillon v. Trustees of St. Patrick's Cathedral*, 201.

**EVIDENCE.**

8. Question as to corporation's negligence was presented for jury where it appeared plaintiff was injured as result of caving in of sides of excavation where it was custom, sometimes, to provide for shoring up excavations and where shoring was omitted. *Dillon v. Trustees of St. Patrick's Cathedral*, 201.

**CONTINUING DISABILITY.**

9. Rehearing and further award — evidence not justifying conclusion that claimant was not able to work — where it is addressed to no one and fails to connect up with accident in any way unsworn statement signed by doctor is not competent evidence. *Dunn v. Brooklyn Rapid Transit Co.*, 748.

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